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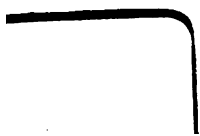
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v.1

A TREATISE
ON THE
LAW OF COMPANIES,

CONSIDERED AS A BRANCH OF
THE LAW OF PARTNERSHIP,

3786

BY
THE RIGHT HONOURABLE LORD LINDLEY,
A LORD OF APPEAL IN ORDINARY.

4. L

SIXTH EDITION

BY
THE HONOURABLE WALTER B. LINDLEY,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

✓

VOL. I.

LONDON:
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PREFACE.

THE present volumes are the Sixth Edition of a portion of the author's former "Treatise on the Law of Partnership, including its application to Companies." When that Treatise was first published, viz., in 1860, the Law of Companies was being developed by legislative enactment and judicial decision out of the Law of Partnership; and it appeared to the author desirable to trace that development, and to endeavour in one treatise to investigate the Law of Partnership and to determine the extent to which its principles were applicable to Companies. But since that time the Law of Companies has so developed as to require separate treatment; consequently, in 1888, the author divided the former treatise into two parts, each of which was intended to be complete without the other, viz., the Law of Partnership proper, and the Law of Companies, in so far as it has any connection with the former. These volumes, like their immediate predecessor, are devoted to the second of these parts, viz., the Law of Companies considered as a branch of the Law of Partnership.

During the thirteen years which have elapsed since the publication of the Fifth Edition, the Companies (Memorandum of Association) Act, 1890, the Companies (Winding-up) Act, 1890, the Directors' Liability Act, 1890, and the Companies Acts of 1898 and 1900 have been passed; a new body of rules regulating the

compulsory winding up of companies in England and Wales has been issued, and a large number of cases connected with the subject of the present work have been decided, including *Derry v. Peek*, *London Joint Stock Bank v. Simmons*, *British and American Corporation v. Cowper*, *Ex parte Barnes*, *Salomon v. Salomon & Co.*, *Gluckstein v. Barnes* and *Dovey v. Cory*, in the House of Lords; *Newton v. Debenture Holders of the Anglo-Australian Investment Co.* and *Burland v. Earle* in the Privy Council; and *Kingston Cotton Mills Co. (No. 2)*, *Andrews v. Gas Meter Co.* and *The Lagunas Nitrate Co. v. The Lagunas Syndicate* in the Court of Appeal.

The responsibility for the present edition rests on the editor. Doubtless it might have been shortened, but, except in a few instances, the editor thought it better not to alter the text of a work of such recognized authority as the former editions of the author's treatise, merely for the sake of brevity. Moreover, the treatise relates to companies formed under the old law as well as to those formed under the modern Acts of Parliament, and passages and authorities which might safely have been omitted had it been confined to companies of the modern type, may still be of use in connection with the few older companies which still exist. The fact that questions affecting these companies rarely come before the Court or arise in practice renders it the more difficult to distinguish between what is really obsolete and what is only apparently so.

The object of the editor has, therefore, been to adapt the author's treatise to the present state of the law, and to incorporate the new material into it without making unnecessary alterations either in the general arrangement or in the text of the Fifth Edition. But the great increase in the importance of debentures and

debenture stock issued by companies governed by the Companies Acts, and the large number of new cases dealing with this branch of the law, have rendered it necessary to recast that portion of the work which relates to this subject; it is now discussed in the fifth chapter of Book II. in connection with the power of companies to borrow money and other kindred matters.

Section 25 of the Companies Act, 1867, has been repealed; but, in consequence of the doubts which have arisen as to the effect of the repeal, the decisions under that section and under the Companies Act, 1898, may still be of use; they will be found collected in a note at the end of the second section of the third chapter of Book III.

The new procedure introduced into the winding up of companies by the Companies (Winding-up) Act, 1890, and the rules issued thereunder have necessitated considerable additions to Book IV. (see especially chap. 1, sects. 7 (2), 8 and 9); and those portions of the first chapter of that Book which relate to the practice and to the appointment and duties of liquidators in a compulsory winding up, and to arrangements with creditors and contributories under the Joint Stock Companies Arrangement Act, 1870, have been to a large extent re-written. The note dealing with the distribution of the surplus assets of benefit building societies has been removed to the Appendix, which relates to those societies.

The Companies Acts, 1862 to 1900, and the Life Assurance Companies Acts, 1870 and 1872, and the rules promulgated under their provisions, and certain other Acts and rules connected with the subject of the present work, are printed in an appendix; and, to facilitate reference to them, a separate index to

their sections and clauses is inserted immediately before the general index, with which the work concludes.

It must always be borne in mind, that in order to determine any legal question relating to companies, it is indispensable to attend closely to the language of the statutes by which they are governed; and although for convenience, the substance of various statutory enactments has been shortly stated in the text, the reader is warned not to rely on these abridgments, but to consult the statutes themselves in every case which he may have to investigate.

Though the responsibility for the present edition rests on the editor, he has been assisted in its preparation by the author, who has not only given advice and assistance on the chief points of difficulty, but has revised the sheets as they have passed through the press. On the value of this assistance it is needless to dwell, but the editor hopes that the present edition, notwithstanding its faults and imperfections, may thereby have been rendered not altogether unworthy of its predecessors.

The editor also wishes to acknowledge his indebtedness for the assistance which he derived from Mr. Palmer's well-known volume on Debentures in the preparation of the portion of the present work which relates to that subject. (Bk. II., c. 5, § 4.)

Special attention has been given to the indexes of the present edition. For the index to the Acts and rules which are printed in the Appendix, the editor is indebted to Sir W. Cameron Gull, who most generously undertook the laborious task of its preparation and revision, a task of which he had had previous experience when assisting in the last edition of this work.

References to the contemporary reports are given

in the Table of Cases, which has been prepared by Mr. F. C. Phillips, in the employ of Messrs. Sweet & Maxwell, Limited, to whom the editor's thanks are due, not only for the care which he has bestowed in its preparation, and in seeing it through the press, but also for the detection of some false references and misprints for which the editor offers his apologies; they will be found corrected in the Table of Additions and Corrections.

The Table of Additions and Corrections includes the cases reported in the Law Reports for May of the present year.

W. B. L.

4, STONE BUILDINGS,
LINCOLN'S INN.
1902.

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No attempt has been made to collect cases decided since the establishment of the Law Reports, and not reported therein.

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ABBREVIATIONS.

The following abbreviations frequently occur in the present work :—

- R. S. C. = Rules of the Supreme Court, 1883, and subsequent rules.
Bank. Act = The Bankruptcy Act.
Bank. Rules = The Bankruptcy Rules, 1887, and subsequent rules.
Buckley = The Law and Practice under the Companies Acts, 1862—1893, by
 Mr. Justice Buckley. 7th edition. London, 1897.
Part. = A Treatise on the Law of Partnership, by the author of the present
 work. 6th edition. London, 1893.
Act 1890 (in the fourth book) = The Companies (Winding-up) Act, 1890.
Rules (in the fourth book) = The Companies (Winding-up) Rules.

ADDITIONS AND CORRECTIONS.

WHILE the present work has been passing through the press the following cases, to which the references will be found in the Index of Cases, have been reported, viz. :—

Abrahams & Sons, Ltd. [1902], 1 Ch. 695.

Barrow Haematite Co. (on appeal) [1901], 2 Ch. 746.

The Court of Appeal based its decision solely on the ground that the evidence was not sufficient to establish the alleged loss of capital.

Burland v. Earle [1902], A. C. 83.

Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft, &c., Cudell & Co. [1902], 1 K. B. 342.

George Whitechurch, Ltd. v. Cavanagh [1902], A. C. 117.

Joplin Brewery, Ltd. [1902], 1 Ch. 79.

Key & Sons, Ltd. [1902], 1 Ch. 467.

London and Globe Finance Corp., W. N. 1902, p. 16.

The following cases have been affirmed on appeal :—

Att.-Gen. v. London County Council, by the House of Lords, *sub nom.* *London County Council v. Att.-Gen.*, W. N. 1902, p. 30.

Att.-Gen. v. Midland Ry. Co., by the House of Lords, *sub nom.* *Midland Ry. Co. v. Att.-Gen.*, W. N. 1902, p. 40.

Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., by the Court of Appeal [1902], 1 Ch. 146.

Crichton's Oil Co., Ltd., by the Court of Appeal, W. N. 1902, p. 85.

Deverges v. Sandeman, Clark & Co., by the Court of Appeal [1902], 1 Ch. 579.

Ewart v. Fryer, by the House of Lords, *sub nom.* *Fryer v. Ewart* [1902], A. C. 187.

Jacobs v. Morris, by the Court of Appeal, W. N. 1902, p. 48.

Michael v. Hart & Co., by the Court of Appeal [1902], 1 K. B. 482, where, however, there was a compromise as to the mode in which the damages were to be computed.

Oliver v. Bank of England, by the Court of Appeal [1902], 1 Ch. 610.

The following cases have been reversed :—

Bellerby v. Rowland and Marwood's Steamship Co., by the Court of Appeal, W. N. 1902, p. 93.

Thurston v. Nottingham, &c., Building Society, by the Court of Appeal [1902], 1 Ch. 1.

And appeals in the following cases are awaiting the decision of the House of Lords :—

Burrows v. Matabelo Gold Reefs, &c., Co.

Driefontein Consolidated Gold Mines v. Janson.

- Page 43, note (o) ... Add "Where shares are allotted in whole or in part for a consideration other than cash. See also *infra*, pp. 565, 566."
- Page 44, line 5 from bottom ... { Add "This section does not authorize the issue of shares at a discount under colour of a commission. See *Keatinge v. Parinya Consolidated Mines*, W. N. 1902, p. 15, where an injunction to restrain such an issue was granted."
- „ 799 ... {
- Page 45, lines 21 and 22. For "signed or filed" read "signed and filed."
- Page 53 ... { See also on this subject the recent cases on policies for the insurance of gold seized by the late Transvaal Government, viz. :—*Driefontein Consolidated Gold Mines v. Janson* [1901], 2 K. B. 419, now under appeal in the House of Lords; *Robinson Gold Mining Co. v. Alliance Insurance Co.* [1901], 2 K. B. 919, where the seizure was before the outbreak of hostilities; and *Nigel Gold Mining Co., Ltd. v. Hoade* [1901], 2 K. B. 849, where the seizure was after the outbreak of hostilities.
- „ 59 ... {
- Page 56, lines 12—16 ... { This passage requires modification. A mortgage by an infant member to the society is void. See the decision of the C. A. in *Thurston v. Nottinghamshire, &c., Building Society* [1902], 1 Ch. 1, and *infra*, p. 1236.
- „ 249, note (z) ... {
- Page 65, note (c) ... See also *George Whitechurch, Ltd. v. Cavanagh* [1902], A. C. 117.
- Page 82... ... { That the company is not entitled to enter a memorandum of lien or charge on a member's shares on its register, or (if the provisions of Table A (Art. 2) are applicable) on the share certificate, see *W. Key & Son, Ltd.* [1902], 1 Ch. 467.
- „ 165, notes (r) and (t) ... {
- „ 637... ... {
- „ 1315, note (r) ... {
- Page 82, note (o) ... See, too, *Whitworth's Claim* [1901], 1 Ch. 115, noticed *infra*, p. 226.
- Page 91 ... { A person who is induced by misrepresentation or fraud to subscribe the memorandum of association is not entitled to rescind his contract to take the shares for which he has subscribed. See *Lord Lurgan's Case* [1902], 1 Ch. 707.
- „ 95 ... {
- „ 1067 ... {
- „ 1093 ... {
- Page 126, line 19 ... For "they may suffer" read "he may suffer."
- Page 154, note (s) ... See, further, as to restraining a person from carrying on business in his own name, *J. and J. Cash, Ltd. v. Cash*, W. N. 1902, p. 32.
- Page 157, note (a) ... Add "But such a company is not necessarily a railway company for all purposes, e.g., for the purpose of through rates within § 25 of the Railway and Canal Traffic Act, 1888. See *London and India Docks Co. v. Great Eastern Rail.* [1902], 1 K. B. 568.
- Page 161 ... { Articles of association which have been registered and acted on for many years are valid, although they have never been signed in accordance with the requirements of the Act: *Ho Tung v. Man On Insurance Co.* [1902], A. C. 232.
- „ 162 ... {

- Page 161 ... { The Court cannot rectify articles of association on the ground of mistake; mistakes must be corrected by special resolution under § 50 of the Act of 1862, *Evans v. Chapman*, W. N. 1902, p. 78.
- „ 456 ... {
- „ 460 ... {
- Page 162, note (t) ... { Add reference to *Stephens v. Mysore Reefs (Kangundy) Co.* [1902], 1 Ch. 745, where the rule of construction stated in the text, was applied notwithstanding a clause in the memorandum of association purporting to exclude it.
- „ 456, notes (o) and (p) ... {
- Page 169, note (h) ... {
- „ 461, note (m) ... {
- „ 549, note (i) ... {
- „ 555, note (t) ... {
- Page 198, note (g) ... { Add a reference to *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1902], 1 Ch. 146.
- Page 205, note (f) ... { Add “See further, *infra*, p. 415.”
- Page 222, note (z) ... { For “[1894], 2 Ch.” read “[1894], 3 Ch.”
- Page 249 ... { That an insurance company is not bound by a policy issued by it on the basis of misstatements made by an agent of the company in a proposal without the knowledge of but signed by the insured, see *Biggar v. Rock Life Assurance Co.* [1902], 1 K. B. 516.
- Page 249 ... { A company has power to set aside and invest a reserve fund, and the investments may be placed in the name of one of the directors as trustee for the company: *Burland v. Earle* [1902], A. C. 83. It is to be observed that some of the “investments” in this case consisted of bank shares (see pp. 96, 97), but it would seem that no special objection was taken to these shares.
- „ 253 ... {
- Page 249, note (g) ... { *National Bank of Wales* has been affirmed by the House of Lords, *sub nom. Dovey v. Cory* [1901], A. C. 477.
- Page 251, note (n) ... { See, as to notice of dishonour of a bill of exchange, *Fenwick, Stobart & Co., Ltd.* [1902], 1 Ch. 507.
- Page 256, note (a) ... { For “33 & 34 Vict. c. 70” read “33 & 34 Vict. c. 78.”
- Page 270, at end of note (a) ... {
- „ 272, notes (s) and (u) ... {
- „ 378, notes (m) and (n) ... {
- Page 302, note (n), line 3 ... { For “3 Eq. 154” read “3 Ch. 154.”
- Page 309 ... { As to when loan capital is “issued” within the meaning of the Finance Act, 1899, see *Att.-Gen. v. Mayor, &c., of Liverpool* [1902], 1 K. B. 411.
- Page 311, line 16 ... { As to when charges in debentures are “created,” see *Spiral Globe, Ltd.*, W. N. 1902, p. 82.

- Page 318, note (nn) ... Strike out the last part of the note, and see the later cases referred to, p. 1410, note (g), and where the unregistered debentures are some of a series ranking *pari passu*, see *I. C. Johnson & Co., Ltd.*, W. N. 1902, p. 91.
- Page 315, line 17 ... After the words "book debts (x)" add "goodwill." See *Saller v. Leas Hotel Co.* [1902], 1 Ch. 332.
- Page 316, note (c) ... For "*Clyde Tin Plate Co.*, 42 L. T.," read "*Clyne Tin Plate Co.*, 47 L. T."
- Page 318, note (a) ... The reference to *Driver v. Broad* should be [1893], 1 Q. B. 744.
- Page 327, note (b) ... Add a reference to *Abrahams & Sons, Ltd.* [1902], 1 Ch. 695.
- Page 333 ... As to a receiver's liability for rent, see *Hand v. Blon* [1901], 2 Ch. 721 and *infra*, pp. 809, 810.
- Page 334, note (m) ... { As to the right to cut off the supply of electricity to the company's premises when the company is indebted for electricity supplied and a receiver is in possession, see *Husey v. London Electric Supply Corporation* [1902], 1 Ch. 411.
- Page 336, note (f) ... A general charge on the company's property may be sufficient, see *Saller v. Leas Hotel Co.* [1902], 1 Ch. 332.
- Page 337, lines 18—21... The declaration of charge ought to be omitted where there are debenture-holders, other than those of the series represented by the plaintiff, who are not parties to the action; *Prince and Baugh, Ltd.*, W. N. 1902, p. 96.
- Page 337, note (i) ... Add a reference to *Saller v. Leas Hotel Co.* [1902], 1 Ch. 332.
- Page 337, note (m) ... For "[1892], 2 Ch.," read "[1892], 1 Ch."
- Page 339 ... { If directors, who are entitled to remuneration for their services as directors, are appointed by the Court to be receivers and managers for debenture-holders, and are allowed remuneration in that capacity, they will continue to be entitled to their remuneration as directors until the commencement of a winding up: *South Western of Venezuela (Barquisimeto) Rail. Co.* [1902], 1 Ch. 701.
- Page 345, note (g) ... A power to charge the undertaking may authorise a specific charge on the surplus lands: *Stagg v. Medway Upper Navigation Co.*, W. N. 1901, p. 69.
- Page 375, note (i) ... See, too, *Dunlop Pneumatic Tyre v. Actien Gesellschaft, &c., Cudell & Co.* [1902], 1 K. B. 342, where a foreign corporation which had a stand at an exhibition at the Crystal Palace in charge of a person employed by them to take orders for the sale of their goods was held to be resident in this country during the exhibition for the purpose of service; the test of residence for this purpose being "whether the corporation is conducting its own business at some fixed place within the jurisdiction," *per* Collins, M. R., p. 347.

- Page 375, note (m) ... After § 62 add "See *infra*, p. 1276, note (s)."
- Page 395, note (g) ... For "4 ib." read "5 ib."
- Page 408, note (d) ... For "*Wingfield v. Peel*, 13 L. J.," read "*Wingfield v. Peel*, 12 L. J."
- Page 427, note (f) ... For "[1894], 1 Ch. 359," read "[1894], 3 Ch. 159."
- Page 428 ... { In *Greenwell v. Porter* [1902], 1 Ch. 530, the Court upheld the validity of an agreement, entered into by shareholders who were executors and also directors of a company, to vote for and not against the re-election of certain directors, and granted an injunction to restrain them from voting against such re-election.
- " 799 ... {
- Page 436, note (u) ... For "arrangement" read "agreement."
- Page 443, note (p) ... Add a reference to *George Newman & Co.* [1895], 1 Ch. 674, noticed *infra*, p. 520.
- Page 452, line 21 ... For "on account" read "an account."
- Page 463, note (b) ... For "30 Ch. D." at end of note read "39 Ch. D."
- Page 464, lines 12—13 ... For "are contained" read "are not contained."
- Page 485, note (e) ... For "[1900], 2 Ch.," read "[1898], 2 Ch."
- Page 517, line 15 ... For "*Albion Steam and Iron Works Co.*" read "*Albion Steel and Wire Co.*"
- Page 526, note (o) ... For "[1891], A. C.," read "[1901], A. C."
- Page 549, line 13 ... Before the word "companies" insert the word "limited."
- Page 556, note (a) ... Add at the beginning of the note, "See, too, *Borough Commercial, &c., Building Society* [1893], 2 Ch. 242, referred to *infra*, p. 721."
- Page 557, note (f) ... { *Eichbaum v. City of Chicago Elevators, Ltd.* [1891], 3 Ch. 454, has been doubted in the Court of Appeal, see *Bellerby v. Rowland and Marwood's Steamship Co. W. N.*, 1902, p. 94.
- " 720, note (x) ... {
- Page 557 ... { See also *Development Co. of Central and West Africa* [1902], 1 Ch. 547, where the Court declined to authorise a reduction of capital on the ground that it was part of a scheme for increasing the capital and issuing the new capital at a discount.
- " 560, note (g) ... {
- Page 560, note (g) ... For "p. 159, note (i)" read "p. 549, note (i)."
- Page 569, note (r) ... } See, too, *Ebenezer Timmins & Sons, Ltd.* [1902], 1
- " 572, note (e) ... } Ch. 238, and *infra*, p. 1096.
- Page 570, note (g) ... The reference to *Fothergill's Case* is 8 Ch. 270.
- Page 598, note (e) ... Add at end of note a reference to *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1902], 1 Ch., pp. 158, 159.
- Page 599, note (h) ... {
- " 600, notes (r) and (s) ... { See also *Bond v. Barrow Haematite Steel Co.* [1902], 1 Ch. 352.
- " 601, note (y) ... {
- " 608, note (z) ... {
- Page 601, note (b) ... For "*Foster v. New Zealand*" read "*Foster v. New Trinidad*."
- Page 605, notes (d) and (g) ... For "*Coxon v. Grant*" read "*Coxon v. Gorst*."

- Page 613 ... If a company resident here carries on a trade partly in this country, the questions what trade it carries on and what profits are assessable to income tax are questions of fact which the Commissioners of Income Tax have jurisdiction to decide, and a prohibition will not lie to prevent them from doing so : *R. v. General Commrs. of Income Tax for Clerkenwell* [1901], 2 K. B. 879.
- Page 614, note (t) ... For "*England v. Wall*" read "*England v. Webb*."
- Page 615, note (y) ... For "3 App. Cas." read "6 App. Cas."
- Page 641 ... { As to the title of a notice of motion under 5 Vict.
c. 5, see *Re Court of Chancery Act*, 1841, W. N.
,, 644 ... { 1902, p. 42.
- Page 646, note (q) ... {
,, 658, note (n) ... { Add a reference to *Ireland v. Hart and Others*
,, 660, note (x) ... { [1902], 1 Ch. 522.
,, 1133, note (h) ... }
- Page 667, note (e) ... For "39 Ch. D." read "38 Ch. D."
- Page 693, note (r) ... For "31 Ch. D." read "13 Ch. D."
- Page 720, notes (t) and (u) The decision of Kekewich, J., in so far as he refused to rectify the register in *Bellerby v. Rowland and Marwood's Steamship Co.*, has been reversed by the Court of Appeal, see W. N. 1902, p. 93.
- Page 735, note (x) ... For "[1898], 2 Q. B." read "[1898], 1 Q. B."
- Page 736, note (c) ... See, too, *Bartholomew v. Menzies* [1902], 1 Ch. 680, as to shares in a building society.
- Page 741, note (p) ... Add "in cases to which the Apportionment Act 1870, applies, see *infra*, p. 743, 744."
- Page 769, note (s) ... Add reference to *Anderson v. Midland Ry. Co.* [1902], 1 Ch. 368.
- Page 772, note (d) ... The reference to *Mason v. Harris* is 11 Ch. D. 97.
- Page 773, note (o) ... For "2 Ch. 262" read "3 Ch. 262."
- Page 777, note (a) ... { Add a reference to *Burland v. Earle* [1902], A. C.
,, 779, note (i) ... { 83.
- Page 783, note (f) ... For "1 De G. & J." read "2 De G. & J."
- Page 807 ... Add to the list of cases where an injunction was refused, *Anderson v. Midland Ry. Co.* [1902], 1 Ch. 368, where the Court declined to grant an injunction at the instance of a shareholder in a railway company suing on behalf of himself and the other shareholders to restrain the railway company from carrying goods for a customer at a rate alleged to be an undue preference. Such an act is not *ultra vires*.
- Page 839, note (d) ... The reference to *Re Jones* is [1898], 2 Ch. 83.
- Page 857 ... { A creditor's petition should show that the company
,, 883 ... { has assets available for distribution in a winding up. Practice Note, W. N. 1902, p. 77.

- Page 865 ... } Head-line : *For* "Grounds for winding up" *sub-*
 " 867 ... } *stitute* "Contributories' Petitions."
 " 869 ... }
 Page 885, note (c) ... *Add* reference to Practice Note, W. N. 1902, p. 77.
 Page 922, note (g) ... *For* "44 & 45 Vict. c. 58" *read* "44 & 45 Vict.
 c. 68."
 Page 929, line 18 ... *For* "has been asked" *read* "is asked."
 Page 935, line 19, note (h) The solicitor may be required to give an under-
 taking not to communicate the information
 obtained on the examination or to use it except
 for the purposes of re-examination, and if he
 refuses to give such an undertaking he may be
 excluded : *London and Northern Bank, Ltd.*, W. N.
 1902, p. 55 ; affirmed *ib.* p. 84.
 Page 941, note (l) ... Strike out the words from "it omits" to "and (6)"
 inclusive, and see the concluding words of
 sub-s. (2) of § 10.
 Page 972, note (t) ... *Add* reference to the regulations of the Board of
 Trade, printed on pp. 1592—1593.
 Page 976, note (g) ... *For* "7 Ex." *read* "5 Ex."
 Page 981, note (q) ... *For* "*ante*, p. 989," *read* "*ante*, p. 980."
 Page 996 ... As to payment of dividends, see the regulations of
 the Board of Trade, printed p. 1593.
 Page 1039, note (e) ... *For* "[1894], 1 Ch." *read* "[1894], 2 Ch."
 Page 1061, note (k) ... *For* "[1896], 1 Ch." *read* "[1896], 2 Ch."
 Page 1087, note (e) ... *For* "[1898], 3 Ch." *read* "[1891], 3 Ch."
 Page 1119, line 10 ... *For* "transferor" *read* "transferee."
 Page 1195, note (b) ... *For* "[1891], 5 Ch." *read* "[1891], 2 Ch."
 Page 1238, note (r) ... *For* "42 Ch. D." *read* "43 Ch. D."
 Page 1242, note (r) ... *For* "32 L. J. Ch." *read* "34 L. J. Ch."
 Page 1410, note (q) ... For the form of order when the unregistered
 debentures form part of a series ranking *pari*
passu, see *I. C. Johnson & Co., Ltd.*, W. N.
 1902, p. 91.

THE LAW OF COMPANIES.

INTRODUCTORY.

1. *Nature of a company.*

By a company is meant an association of many persons INTRODUCTORY. who contribute money or money's worth to a common stock and employ it for some common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it or to whom it belongs are *members*. The proportion of capital to which each member is entitled is his *share*. Shares are always transferable; although the right to transfer them is often more or less restricted. The purpose of the company is usually the carrying on of some trade or business with a view to profit, and the division of such profit amongst the members; this, however, is not an essential ingredient of a company (a).

A company which is neither incorporated nor privileged by the Crown or the Legislature is substantially a partnership; Companies compared with partnerships. and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the company, like an ordinary firm, is not in a legal point of view distinguishable from the members composing it (b).

(a) *In re Russell Institution, Fig-gins v. Baghino* [1898], 2 Ch. 72; *In re Jones, Clegg v. Ellison*, ib. 83, differing on this point from the *dicta* of Kay, J., in *In re The Bristol Athenæum*, 43 Ch. D. 236. It is not required by the Companies Acts. See the words "*any lawful purpose*" in § 6 of the Companies Act, 1862; the definition in § 181; and § 23 of the Act of 1867.

(b) Part 118 *et seq.*

INTRODUCTORY.

A company which is incorporated, whether by charter, special Act of Parliament, or registration, is in a legal point of view distinct from the persons composing it, and is therefore regarded by lawyers somewhat as a firm is by non-lawyers. It sues and is sued by a name of its own, and its continuous existence is not affected by changes amongst its members.

A company which without being incorporated is privileged to sue and be sued by the name of some public officer, is as it were half-way between an incorporated and an unincorporated company. So far as its privileges do not make a difference, the company is a partnership; and so far as its privileges extend, it may without any great inaccuracy be likened to a corporation; for the main object of these privileges is to confer upon the company a sort of continuous existence whatever changes may take place amongst the individual shareholders.

2. Historical sketch of the law relating to companies.

Sketch of company law.

By the common law of this country every association of persons formed for the sake of sharing profits, is either a partnership or a corporation; and a company which is neither a corporation nor a partnership, is a thing unknown to the common law of England (c). It has even been said that a large partnership, the shares of which are transferable without the assent of all the members, is illegal at common law; and although the better opinion is that this is not so (d), still the courts treat as illegal any association for profit which attempts to arrogate to itself the privileges of a body corporate (e). But within the last century associations unknown to the common law have struggled into existence, and after much opposition have become legal. These are commonly called companies, or more accurately joint-stock companies.

Progress of joint-stock companies.

When unincorporated companies, with a joint-stock divided into numerous transferable shares, began to assume

(c) *M'Intyre v. Connell*, 1 Sim. N. S. 233. Cost-book mining companies are partnerships governed by special local laws.

(d) See *Walburn v. Ingilby*, 1

M. & K. 76.

(e) *Blundell v. Winsor*, 8 Sim. 601. This subject will be examined more fully hereafter.

importance, and to force themselves upon the attention of the legislative and judicial departments of the State, the reception they met with was by no means encouraging. Owing to the then established rules relating to parties to actions at law and suits in equity, a joint-stock company could not practically sue its own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time, the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced. INTRODUCTORY.

Under these circumstances, joint-stock companies were regarded as nuisances, and the first legislative enactment relating to them (6 Geo. 1, c. 18, commonly called the Bubble Act) was an attempt to put them down altogether. This attempt was simply futile; and notwithstanding the Bubble Act, joint-stock companies increased both in number and importance. It was not, however, until the end of the first quarter of the last century, that the legislature began to retrace its steps. Regarded as nuisances.

In the year 1825 the Bubble Act was repealed (*f*), and from that time to the present the legislature has endeavoured by various means so to amend the law as to give free scope to a combination of capital, and at the same time to prevent injustice being done either to or by its subscribers. Reaction.

Even when the opposition which joint-stock companies had to encounter was greatest, they could always apply to the Crown for a charter of incorporation. Whether a charter would be granted, depended mainly on the opinion which the officers of the Crown entertained of the proposed objects and constitution of the company. If a charter was granted, the company became a corporation for all intents and purposes; and with this amongst other results, viz., that the members of the company were rendered personally irresponsible for its debts. At common law, the Crown had no power to grant charters of incorporation, and also to declare that the persons incorporated by them should be subject to the same liabilities as members of unincorporated societies (*g*). Charters.

(*f*) 6 Geo. 4, c. 91. The 2nd c. 114.
 section of the Bubble Act had been (*g*) See *Elve v. Boyton* [1891], 1
 previously repealed by 5 Geo. 4, Ch. 501.

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6 Geo. 4, c. 91.

4 & 5 Wm. 4,
c. 94.7 Wm. 4 &
1 Vict. c. 73.Special Acts of
Parliament.

But in 1825 an Act was passed, empowering the Crown to grant charters of incorporation, and at the same time to declare that the persons incorporated should be personally liable for the debts of the body corporate (*h*). This Act was, in the year 1834, followed by another, enabling the Crown, without incorporating a company at all, to confer upon it, by means of letters patent, certain privileges, and especially the privilege of suing and being sued in the name of a public officer (*i*). Both these Acts have since been repealed, but the powers conferred upon the Crown by the Act of 1834 are still exercisable under the provisions of the repealing Act (*k*).

If a charter could not be obtained from the Crown, a company which desired to be legally recognised as such was compelled to apply to Parliament for a special Act of its own. The Act usually sought to be obtained was either an Act incorporating the company, or an Act which, without incorporating it, authorised it to sue and be sued by its secretary, or some other officer.

Acts incorporating companies were sometimes silent as to the liabilities of their members, and in that case, they were not to any extent responsible for the debts of the incorporated company (*l*). But other incorporating Acts rendered the members of the company liable for its debts to the extent of their respective shares of the nominal capital of the company, or of so much thereof as might not have been paid up.

Acts which did not incorporate companies, but merely empowered them to sue and be sued, invariably, it is believed, contained clauses rendering the shareholders liable for the debts of the company to the fullest extent.

Until the year 1826, there was no method by which a company could acquire any of the privileges of a corporation, or the power of suing and being sued by a public officer, except by means of a special application to the Crown or to Parliament. But in 1826 a general Act was passed enabling joint-stock banking companies to obtain the power of suing and

(*h*) 6 Geo. 4, c. 91, § 2.(*i*) 4 & 5 Wm. 4, c. 94.(*k*) 7 Wm. 4 & 1 Vict. c. 73, and
47 & 48 Vict. c. 56, § 1.(*l*) See *per* Cave, J., in *Sheffield & South Yorkshire Permanent Building Society*, 22 Q. B. D., p. 476.

being sued in the name of a public officer, by simply complying with certain specified conditions, and making certain returns to the stamp office (*m*). And in the year 1844, another general Act was passed, enabling all companies (with some exceptions) to obtain from an office in London a certificate of incorporation without applying either for a charter, or for an Act of Parliament (*n*). But, what is not a little remarkable is, in this very same year, 1844, the legislature retraced its steps as regards banking companies, and compelled banking companies formed after May, 1844, to apply to the Crown for incorporation. This the Crown was empowered to grant, without however limiting the liability of the shareholders (*o*). INTRODUCTORY.
7 & 8 Vict.
c. 110.
7 & 8 Vict.
c. 113.

As regards liability to creditors, companies formed under these Acts were essentially partnerships. Their members were liable to their last farthing for the debts of the companies; only before recourse for payment of such debts could be had against an individual member, it was necessary for the creditors to show that they could not obtain payment from the company to which that member belonged. Companies which desired limited liability in any other sense than this, were still obliged to procure a Charter from the Crown, or a special Act of Parliament, and it was not until the year 1855 (*p*) that the law in this respect was altered. In that year, however, an Act was passed enabling companies registered under the general Act of 1844 (other than insurance companies), to obtain a certificate of incorporation with limited liability (*q*). Limited
liability.
18 & 19 Vict.
c. 133.

None of these Acts provided for the dissolution and winding up of companies. The first Act upon this subject was passed in 1844, and it declared what were to be deemed acts of bankruptcy in the case of joint-stock companies, and how bankrupt companies were to be wound up for the benefit of their creditors (*r*). In the year 1846 an Act was passed for winding up railway companies projected before July, 1846, and not incorporated by Act of Parliament (*s*). In 1848 and 1849, two Winding-up
Acts.
7 & 8 Vict.
c. 111.
9 & 10 Vict.
c. 28.
11 & 12 Vict. c.
45, and 12 &
Vict. c. 108.

(*m*) 7 Geo. 4, c. 46.

(*n*) 7 & 8 Vict. c. 110.

(*o*) 7 & 8 Vict. c. 113.

(*p*) Long before this, however, the Parliament of Ireland had passed an Act (21 & 22 Geo. 3,

c. 46), authorising the formation of partnerships with limited liability.

(*q*) 18 & 19 Vict. c. 133.

(*r*) 7 & 8 Vict. c. 111.

(*s*) 9 & 10 Vict. c. 28.

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statutes were passed enabling joint-stock companies generally to be dissolved and wound up in equity without the necessity of a bill to which all the shareholders must have been parties (*t*).
 13 & 14 Vict. c. 83. The following year, 1850, produced another Act for winding up railway companies incorporated by special Acts of their own (*u*).

A rapid sketch has now been given of the progress of joint-stock company legislation down to the year 1856. In 1856 and 1857 Acts (*x*) were passed, repealing more or less nearly all the Acts which have been noticed, consolidating what were supposed to be their most valuable provisions, and introducing extensive alterations of an entirely new character. These Acts, however, were themselves repealed by the Companies Act, 1862 (*y*), which is now the principal statute relating to joint-stock companies, and will be found printed in the appendix at the end of this treatise. In the same year, 1862, a very important statute was passed relating to industrial and provident societies (*z*), and placing them on much the same footing as limited joint-stock companies.

Other statutes.
 1 & 2 Vict. c. 110.

In addition to the statutes which have been referred to already, there was an important Act passed in the year 1838, enabling separate creditors of shareholders in public companies to obtain an order charging their debtors' shares, whereby payment of their debts can be obtained without the intervention of a sheriff and a seizure by him of the property of the company (*a*); and in the year 1841 another Act was passed, enabling the Court of Chancery, on a summary application, to restrain any public company from allowing any specified shareholder to transfer his shares or to receive dividends in respect of them (*b*).

5 Vict. c. 5.

(*t*) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

(*u*) 13 & 14 Vict. c. 83.

(*x*) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14.

(*y*) 25 & 26 Vict. c. 89, amended by 27 & 28 Vict. c. 19; 30 & 31 Vict. c. 47, and c. 131; 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 46 & 47 Vict. c. 28, and c. 30; 49 & 50 Vict. c. 23; 51 & 52 Vict. c.

62; 53 & 54 Vict. c. 62, and c. 63; 56 Vict. c. 14; 56 & 57 Vict. c. 58; 60 Vict. c. 19; 61 & 62 Vict. c. 26; and 63 & 64 Vict. c. 48.

(*z*) 25 & 26 Vict. c. 87, repealed by 39 & 40 Vict. c. 45. A note on these societies, which are now governed by 56 & 57 Vict. c. 39, will be found in the appendix.

(*a*) 1 & 2 Vict. c. 110, § 14 *et seq.*

(*b*) 5 Vict. c. 5, § 4.

The year 1845 produced three statutes incorporating clauses usually inserted in special Acts of Parliament relating to railway and other companies which interfere with private property; and of these statutes, one, viz., the Companies Clauses Consolidation Act (c), forms an important part of the law to which this treatise relates. INTRODUCTORY.
8 & 9 Vict. c. 16.

In 1865, after a long and arduous struggle, an Act (Bovill's Act) was passed extending the principle of limited liability to large classes of persons previously excluded from it, and enabling them to lend their money and render their services in consideration of a share of profits, without thereby exposing themselves to indefinite losses. This Act has since been repealed, but its provisions have been incorporated in the Partnership Act, 1890, and are discussed in the volume relating to Partnerships. 28 & 29 Vict.
c. 86.

The criminal law applicable to partners and directors, with respect to thefts, embezzlements, fraudulent accounts, and statements, was amended in 1861 and 1868; and within the last few years important Acts have been passed relating to Cost-book mining companies and Life insurance companies.

In the appendix will be found a chronological list of the statutes relating to companies so far as they fall within the scope of this work, and also a table showing which of these statutes are now in force.

3. *Different sorts of companies.*

Associations of persons having gain for their object, will be found to belong to one or other of the following classes, viz. :— Different sorts
of partnerships
and companies.

1. Partnerships in the proper sense of the word. Partnerships.
2. Partnerships with more members than usual, and with transferable shares. To this class belong all joint-stock companies which do not belong to one or other of the classes following :— Large partnerships.

3. Partnerships governed by certain local customs which Partnerships
governed by
local customs.

(c) 8 & 9 Vict. c. 16, amended by 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 38 & 39 Vict. c. 66; 47 & 48 Vict. c. 43; 51 & 52 Vict. c. 48; 52 & 53 Vict. c. 37; 55 & 56 Vict. c. 19; and by 57 & 58 Vict. c. 56.

INTRODUCTORY. exclude those laws, applicable to partnerships generally, with which the customs are inconsistent. To this class belong Cost-book mining companies.

Partnerships empowered to sue and be sued. 4. Partnerships privileged by the Crown or the legislature to sue and be sued by a public officer. These companies are sometimes said to be *quasi* incorporated; they include joint-stock banking companies, governed by the Act of 7 Geo. 4, c. 46, joint-stock companies governed by the Letters Patent Act of 7 Will. 4 & 1 Vict. c. 73, literary and scientific institutions governed by the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112) (*d*), and a number of insurance and other companies governed by special Acts of their own.

Corporations proper. 5. Corporations in the proper sense of the term, the members of which are to no extent liable to the debts of the body corporate. These must be created either by royal charter or by Act of Parliament (*e*), and to them the law of ordinary partnerships has little, if any, application.

Incorporated companies. 6. Partnerships incorporated by Act of Parliament, or by royal charter in pursuance of an Act of Parliament (*f*), but so nevertheless, as to leave their members more or less liable to the debts of the whole body. Companies governed by the Companies Clauses Consolidation Act are, and banking companies governed by the repealed Act of 7 & 8 Vict. c. 113, were, types of this class.

Registered companies. 7. Partnerships incorporated by registration. These constitute the great mass of joint-stock companies, and are of two sorts, according as the liability of the members for the debts of the body corporate is unlimited, or limited.

Unlimited. The first sort included all joint-stock companies governed by the repealed Act of the 7 & 8 Vict. c. 110, and it includes all unlimited companies registered under the Acts of 1856–8, or under the Companies Act, 1862.

(*d*) This Act (§21) also confers this privilege on incorporated institutions governed by it which are not entitled to sue and be sued by any corporate name.

(*e*) Incorporation may arise by necessary implication from the provisions of an Act. See *Mayor of*

County Borough of Salford v. County Council of Lancashire, 25 Q. B. D. 384; *Conservators of River Tone v. Ash*, 10 B. & C. 349; *Jefferys v. Gurr*, 2 B. & Ad. 833.

(*f*) An Act is necessary to authorise a charter of this nature. *Elve v. Boyton* [1891], 1 Ch. 501.

The second sort included those companies which availed themselves of the short-lived Act of the 18 & 19 Vict. c. 139, and now includes all companies registered as limited companies under the Acts of 1856-8, or under the Companies Act, 1862 (*g*).

Limited liability companies again are of two sorts, viz., 1, those in which the liability of the members is limited by the amount of their shares; and 2, those in which the liability of the members is limited by guarantee; *i.e.*, by the amount they have respectively undertaken to pay in the event of a contribution becoming necessary in order to discharge the liabilities of the company (*h*). Companies limited by guarantee may have their capitals divided into shares or not (*i*), and are supposed to admit of greater varieties of internal organisation than companies limited by shares. The latter, however, are much the more numerous.

The following table conveniently exhibits the above classes of companies.

Joint Stock Companies	Unincorporated, <i>viz.</i>	{ Large Partnerships. Cost-Book Mining Companies.	
		Companies empowered to sue and be sued by a public officer, including	{ Banking Companies governed by 7 Geo. 4, c. 46. Companies governed by the Letters Patent Act (7 Wm. 4 & 1 Vict. c. 73). Companies having special Acts of their own.
Incorporated by		{ Special Act of Parliament, <i>e.g.</i> , Railway, Canal, Dock, and Waterworks Companies. Royal Charter	{ In which the members are not liable to the debts of the company. In which the members are liable to the debts of the company.
			{ Without limited liability.
		Registration	{ With limited liability } limited by shares. { } limited by guarantee.

(*g*) To this class also belonged Irish anonymous partnerships, governed by 21 & 22 Geo. 3, c. 46 (Irish), repealed by the Companies Act, 1862.
 (*h*) 25 & 26 Vict. c. 89, § 7.
 (*i*) *Ib.*, § 14, and 63 & 64 Vict. c. 48, § 27, which apparently is

INTRODUCTORY.

Public com-
panies.

For some purposes, and particularly in order properly to interpret certain statutes (*k*), it is necessary to distinguish *public companies* from others. But in this, as in many other instances, the word public is used with no definite signification; and it is extremely difficult to say exactly what the essential character of a public company really is. It has, however, been decided that banking companies, governed by the 7 Geo. 4, c. 46, are public companies within the meaning of the statute 1 & 2 Vict. c. 110, s. 14 (*l*); and that an insurance company governed by a special Act of its own (*m*), and every company registered under the Companies Act, 1862 (*n*), are public companies within the meaning of the Apportionment Act of 1870. It has also been held that companies registered under the Companies Act, 1862, are public companies within the meaning of a trust investment clause (*o*). It would, however, seem that those companies only are public which are either incorporated, or, if unincorporated, are endowed by the Crown or the legislature with some special privileges, and are bound to make some kind of return or list of their officers or members which the public have a right to see. A mere partnership, however large and however transferable its shares, is apparently not a public company (*p*).

Companies not
for gain.

Companies formed for merely scientific, literary, artistic, or charitable purposes, and not with any view to the acquisition

intended to prevent the formation of such companies as that in *Malleon v. General Mineral Patents Syndicate, Ltd.* [1894], 3 Ch. 538.

(*k*) The statutes here referred to are: 1 & 2 Vict. c. 110, § 14, relating to executions against shareholders for their separate debts; 24 & 25 Vict. c. 96, §§ 81 to 84, relating to frauds by directors, officers, and members of companies; 33 & 34 Vict. c. 35, § 5, relating to the apportionment of dividends.

(*l*) *M'Intyre v. Connell*, 1 Sim. N. S. 225.

(*m*) *Carr v. Griffith*, 12 Ch. D. 655.

(*n*) *Re Lysaght* [1898], 1 Ch. 115.

(*o*) *In re Sharp, Rickett v. Sharp*, 45 Ch. D. 287. But companies so registered are not companies "incorporated by Act of Parliament" within the meaning of such a clause (*Re Smith, Davidson v. Myrtle* [1896], 2 Ch. 590), though a company incorporated by royal charter granted in pursuance of an Act of Parliament and of such a nature that it could not have been granted without the Act is. *Elve v. Boyton*, [1891] 1 Ch. 501.

(*p*) See the cases cited in notes (*l*), (*m*), (*n*), *supra*, and *Jones v. Ogile*, 8 Ch. 192.

of gain or the avoidance of loss by themselves or their members do not fall within the scope of this treatise, which is confined to companies formed for the purpose of acquiring and dividing profit in some form or other, or, as in the case of mutual insurance companies, of avoiding loss. INTRODUCTORY.

Owing to the course legislation has taken and to the classes into which companies must be divided if confusion is to be avoided, it is absolutely necessary to consider companies not only with reference to general principles more or less applicable to them all, but also particularly with reference to the statutes applicable to their several sorts, viz. :—

1. The Banking Act of 7 Geo. 4, c. 46.
2. The Letters Patent Act, 7 Wm. 4 & 1 Vict. c. 73.
3. The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16.
4. The Companies Act, 1862.

BOOK I.

OF THE FORMATION OF COMPANIES AND OF THE ALLOTMENT OF SHARES.

General observations.

Book I.

Companies as distinguished from partnerships.

A COMPANY, so far as it is only a partnership consisting of a large number of persons having a joint stock, and associated for the purpose of sharing profits, is formed in precisely the same manner as any other partnership, viz., by agreement. This matter is dealt with in the volume on Partnership, it is therefore unnecessary here to dwell upon the formation of those companies which, being unincorporated and subject to no special statutory provisions have nothing to distinguish them from societies the nature and formation of which have been explained in that volume.

Agreement the basis of companies.

With respect to other companies, an agreement to share profits or to take shares is more or less remotely the basis of them all.

Indeed, except where a person is made a member of a company by some Act of Parliament which there is no gainsaying, it may be safely laid down that no person can become an original member (*a*) of a company in the absence of some agreement, express or implied, between himself and the company; and further that every person who has agreed with a company to become a member of it can compel the company to do what is necessary to constitute him a member; and can on the other hand be himself compelled to do what is necessary to become a member, or to submit to the completion by the company of those formal acts, *e.g.*, registration, which may be necessary to make him, in point of law, a member of it.

(*a*) Members by transfer from other members are not here referred to.

What is necessary to constitute a binding agreement with a company to become a member of it, is determined by the general law of contracts as applied to the company in question; and what is necessary to become an actual member of any particular company depends upon the nature of that company, *i.e.*, upon its own regulations, or the statutory enactments relating to it. Each inquiry involves some examination into the nature of the company under consideration; for contracts with it depend for their validity on the authority of the persons who enter into those contracts on behalf of the company; and what constitutes membership depends entirely on the kind of company which is spoken of. Both of these matters will be examined hereafter.

Practically the great bulk of companies are formed as follows. A few persons called *promoters* form a scheme by which they say money may be made but requiring considerable funds for its realisation. To make their scheme known and to raise the funds required, they publish a *prospectus*, setting forth the nature of the scheme and the amount of capital necessary to carry it out, and inviting persons to become subscribers. Sometimes the *prospectus* is issued before the company has any legal existence; at other times the promoters or their friends do what is necessary to create the company as a legal body and issue the *prospectus* after the company has been created. In either case the *prospectus* is a very important document; for on the faith of it persons are intended to apply, and do in fact apply, for shares in the company to be formed or already formed as the case may be (*b*).

The Companies Act, 1900, contains some important provisions with regard to the allotment of shares and the contents of prospectuses issued by companies registered under the Companies Act, 1862. These provisions will be referred to at the end of the first chapter after the general law relating to these matters has been discussed.

The relation between the promoters of a company on the one hand and the company and its members on the other is

(*b*) *Karberg's case* [1892], 3 Ch. 1, p. 13.

Book I.

extremely complex, and will be examined hereafter ; but in order to understand that relation it is necessary to explain the mode in which companies are formed and the doctrines of agency as applied to them. These subjects will be dealt with in Books I. and II. ; and the relation of promoters to their companies will be discussed in Book III.

CHAPTER I.

AGREEMENTS TO TAKE SHARES.

SECTION I.—APPLICATIONS FOR AND ALLOTMENT OF SHARES.

AGREEMENTS to take shares in a company about to be formed (or if technically formed already having its capital still unsubscribed), are usually entered into by an application for shares on the one hand and by an acceptance of such application on the other. Bk. I. Chap. 1.
Sect. 1.

In practice, the application is generally a printed form of request, addressed to the secretary or directors of the company, or to persons named by the projectors, and expressing an agreement on the part of the applicant to take a certain number of shares in the company, or such smaller number as may be allotted to him. The form is signed by the applicant, and he generally pays to the bankers of the company or projected company a small deposit on each share applied for, and obtains from the bankers a receipt for the payment. The payment is usually made before or at the time when the application is sent in. Application for
shares.

An application for shares sometimes takes the form of an offer to "underwrite" them; this is in effect an application for an allotment of so many of the shares named in the offer as shall not be applied for by the public (*a*). Underwriting.

The application for shares, in whatever form it is made, and whether accompanied by the payment of a deposit or not, is only an offer to take the shares applied for, and may, like any other offer, be retracted before it has been accepted (*b*); a verbal revocation is sufficient if made to a person who has Application for
shares revoked
before allotment.

(*a*) *Ex parte Audain*, 42 Ch. D. 1. *Gledhill's case*, 3 De G. F. & J. 713;

(*b*) *Wallace's case* [1900], 2 Ch. *Ramsgate Victoria Hotel Co. v. Montefiore*, and *Sane v. Goldsmid*, L. R. 671; *Ritoe's case*, 4 Ch. D. 774, where the applicant was a director; 1 Ex. 109. See, also, *Chapman's*

Bk. I. Chap. 1. authority to receive it (c). The right to revoke is not excluded
Sect. 1. ---

by the insertion in the application of words to the effect that the applicant agrees to accept the shares applied for, or any less number that may be allotted to him, and consents to be registered in respect of them; for such words themselves only amount to an offer and do not constitute an agreement until the offer they express has been accepted (d). But a revocation received after notice of acceptance has been posted is too late (e), even though the letter of revocation is written and posted before the letter of application is received (f). Giving a letter to a postman who has no authority to receive it, is not equivalent to posting it (g).

Underwriting
agreements and
applications
through agents.

Although an application for shares may be revoked before acceptance, yet one person may give to another authority to apply for shares on his behalf which he cannot revoke; so-called underwriting transactions often take this form. For instance, if A. for valuable consideration confers upon B. an authority, which purports to be irrevocable, to apply for shares in a company on A.'s behalf and in A.'s name, and B. to A.'s knowledge has an interest in such authority not being revoked, A. cannot either by notice to B. or to the company revoke B.'s authority, or decline to accept shares subsequently allotted to him on B.'s application (h). If, however, A. only offers to confer such an authority on B., speaking generally, B.'s authority will not arise until he has accepted the offer and given notice of such acceptance to A., so that if in such a case B. applies for shares in A.'s name before having given such notice, A. may decline to accept the shares, even after having received notice of the acceptance of B.'s application (i). The character of A.'s offer and the

case, 2 Eq. 567; *Hebb's case*, 4 Eq. 9; *Pentelow's case*, 4 Ch. 178; *Slatery's case*, 7 Ir. R. Eq. 245.

(c) *Truman's case* [1894], 3 Ch. 272, where verbal notice of revocation given to a clerk of the company, in the absence of the secretary, was held sufficient.

(d) See *Ward's case*, 10 Eq. 659, and *Best's case*, 2 De G. J. & Sm. 650; *Chapman's case*, 2 Eq. 567.

(e) See *Harris' case*, 7 Ch. 587.

(f) *Henthorn v. Fraser* [1892], 2 Ch. 27; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

(g) *Ex parte Jones* [1900], 1 Ch. 220.

(h) *Carmichael's case* [1896], 2 Ch. 643.

(i) *Ex parte Stark* [1897], 1 Ch. 575.

circumstances attending it may, however, be such that no express notice of B.'s acceptance of it is necessary (j). Bk. I. Chap. 1.
Sect. 1.

If the application for shares is acceded to, a letter of allotment is usually sent to the applicant, informing him that so many shares have been (or will be) allotted to him, and that a certain sum, by way of deposit on each share, must be paid to the bankers of the company. Letter of allotment.

A letter of allotment requires a penny stamp if the nominal amount allotted is less than 5*l.*; in other cases a sixpenny stamp is necessary (k). Stamp.

In order that the application and acceptance may constitute a binding agreement the acceptance must be by persons who can bind the company (l); and must be notified to the applicant. Acceptance by an unauthorised person may operate to prevent the withdrawal of the application or the repudiation of the shares if the acceptance be subsequently ratified within a reasonable time (m). Agreement complete by allotment and notice.

But, unless under special circumstances, notice of allotment must be given to the applicant or his agent in order to bind the allottee (n). Notice by post is sufficient (o), even if the notice should fail to reach the allottee or his agent, either owing to the default of the allottee (p) or to some casualty in the post office establishment (q). It is not, however, necessary

(j) *In re Bultfontein Sun Diamond Mine*, 12 Times L. R. 461, and *Ex parte Stark* [1897], 1 Ch. 575.

(k) 54 & 55 Vict. c. 39; 62 & 63 Vict. c. 9, § 9.

(l) *Infra*, Bk. II. c. 2; *Portuguese Consolidated Copper Mines, Ltd.*, 42 Ch. Div. 160; *Ex parte Kennedy*, 44 Ch. D. 472; and *Ex parte Smith*, 39 Ch. D. 546.

(m) *Bolton Partners v. Lambert*, 41 Ch. D. 295; *Ex parte Badman*, 45 Ch. D. 16. But *qu.* how far this decision can be supported see *Fleming v. Bank of New Zealand* [1900], A. C., p. 587.

(n) *Gunn's case*, 3 Ch. 40; *Robinson's case*, 4 ib. 322; *Wallis's case*, ib. 325, note; *Hebbs's case*, 4 Eq. 9;

Shackleford's case, 1 Ch. 567; *Ward's case*, 10 Eq. 659, where the allottee had signed a blank transfer; *Sahlgreen's and Carrall's case*, 3 Ch. 323. See, also, *Pellatt's case*, 2 Ch. 527; *Shackleford's case*, 1 Ch. 567.

(o) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Harris's case*, 7 Ch. 587; *Wall's case*, 15 Eq. 18.

(p) *Townsend's case*, 13 Eq. 148, where the allottee gave an insufficient address.

(q) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216 (overruling on this point *British and American Tel. Co. v. Colson*, L. R. 6 Ex. 108; *Reidpath's case*, 11 Eq. 86); *Harris's case*, 7 Ch. 587.

Bk. I. Chap. 1.
Sect. 1.

to prove express formal notice of the allotment, it is sufficient to show that the allottee in fact knew of it (r).

Moreover, an applicant may dispense with notice of allotment or preclude himself from objecting to its non-receipt (s).

Time for allotment.

If no time is fixed for the acceptance of the application, and it is not accepted within a reasonable time, it will be considered as having been declined (t). What is a reasonable time must depend on the circumstances of each particular case (u); and a prudent applicant who does not receive an answer in what he considers reasonable time, should revoke his application.

Acceptance without allotment.

The acceptance by a company of the offer contained in an application for shares may, it is conceived, be evidenced otherwise than by an actual allotment. Sometimes the offer by the company precedes the application, so that the application is in truth an acceptance of a prior offer (x); and where this is the case an allotment is not necessary to complete the contract, although it may be necessary to constitute the applicant an actual shareholder (y). But allotment is the ordinary evidence of acceptance; and where there has been no allotment, acceptance will not be inferred from the mere facts that the applicant paid a deposit on the shares at the time he applied for them; that he obtained a receipt for the amount of his deposit, and

(r) *Levita's case*, 3 Ch. 36; *Crawley's case*, 4 ib. 322. In both of these the allottee had acted as a shareholder. See also *Richards v. Home Assurance Association*, L. R. 6 C. P. 591, where the allottee became manager. Compare *Pellatt's case*, 2 Ch. 527, where a demand for calls was held not notice.

(s) As in *Bloxam's case*, 33 Beav. 529, aff. on appeal, 4 De G. J. & Sm. 447. This case is regarded as having turned on its own special circumstances, and has not been followed. See the cases referred to above. See, also, as to directors, *Harward's case*, 13 Eq. 30; *Leeke's case*, 6 Ch. 469.

(t) *Ex parte Badman*, 45 Ch. D. 16, *Ramsgate Hotel Co. v. Monte-*

flore, and *Same v. Goldsmid*, L. R. 1 Ex. 109; *Ex parte Bailey*, 3 Ch. 592, and 5 Eq. 428; *Carmichael's case*, 17 Sim. 163; *Mathew's case*, 3 De G. & Sm. 234. See, too, *Union's case*, 1 Sim. N. S. 394; *Conway's case*, 5 De G. & S. 150; *Sharp and James's case*, 1 De G. Mac. & G. 565; *Ex parte Roberts*, 1 Drew. 204.

(u) See *per Bowen*, L. J., 45 Ch. D., p. 35, and cases in last note.

(x) This was the contention in *Wallace's case* [1900], 2 Ch. 671, but the contention failed on the facts.

(y) See *Adams' case*, 13 Eq. 474, where one company transferred its business to another; *Bird's case*, 4 De G. J. & Sm. 200.

that the money has not been returned to him (z); nor from the fact that as a director he ought to have had shares (a). Bk. I. Chap. 1.
Sect. 1.

In order that an application for shares and an acceptance of it (by allotment or otherwise) may constitute a concluded agreement between the applicant and the company or its directors, it is essential that the acceptance shall be in strict conformity with the application, and not depart from it in any material respect. If it does, the acceptance, even if in the form of a letter of allotment, must be regarded as a new offer, which the applicant for shares is at liberty to accept or decline; and there will be no concluded agreement until the new offer has been accepted (b). This has been decided where shares were applied for and those allotted were "not transferable" (c); so where the allotment was made subject to forfeiture on non-compliance with certain conditions (d); so where 100 shares were applied for and only 25 were allotted (e); so where 20l. shares were applied for and 40l. shares were allotted (f). So where the secretary of a company wrote to a provisional committee-man to say that shares had been allotted to him, and asking whether he would accept them; and in answer, the allottee requested that the shares in question might be "reserved for him," an issue was directed to try the question Unconcluded
agreements.

(z) *Best's case*, 2 De G. J. & Sm. 650. See, also, *Ramsgate Victoria Hotel Co. v. Montefiore*, and *Same v. Goldmid*, L. R. 1 Ex. 109.

(a) See *Chapman's case*, 2 Eq. 567; *Abercorn's case*, 4 De G. F. & J. 78, and others of that class noticed hereafter under the head Contributions.

(b) See the next four notes, and compare with them *Harris' case*, 7 Ch. 587; *Peck's case*, 4 Ch. 532, where the term as to payment was held no qualification.

(c) *Duke v. Andrews*, 2 Ex. 290. See, too, *Wontner v. Shairp*, 4 C. B. 404; *Vollans v. Fletcher*, 1 Ex. 20; and compare *Hutton v. Upfill*, 2 H. L. C. 674.

(d) *Jackson v. Turquand*, L. R. 4

H. L. 305, affirming *Aldinell's case*, 1 Eq. 225; *Oriental Inland Steam Co. v. Briggs*, 8 Jur. N. S. 801, and 4 De G. F. & J. 191. Compare these with *Barrett's case*, 2 Dr. & Sm. 415, and 3 De G. J. & Sm. 30, where the new term was accepted by payment, and with *Perrett's case*, 15 Eq. 250, where repudiation came too late.

(e) *Ex parte Roberts*, 1 Drew. 204; *Re Barber*, 15 Jur. 51. The common form of application now in use, is for a certain number of shares, or such smaller number as may be allotted.

(f) See *Gustard's case*, 8 Eq. 438, where the bargain as to the 20l. shares was held binding, but there was no bargain for 40l. shares.

Bk. I. Chap. 1. whether the answer amounted to an acceptance of the offer or
 Sect. 1. not (g). There are several other cases illustrating the same principle, to which, however, it is unnecessary more particularly to allude (h).

Moreover, in cases of this kind, the facts that shares have been allotted to the applicant, and that he has been registered in respect of them and has applied for certificates, do not conclusively show an acceptance by him of the new terms (i).

Conditional
 offers.

Again, if an offer is made to take shares conditionally or upon unusual terms, a clear acceptance of these conditions or terms must be proved in order to constitute a binding agreement: and the mere fact that shares have been placed in the applicant's name is not sufficient to bind him. Thus, in *Shackleford's case* (k), a person applied for shares upon the terms that he should have the refusal of certain contracts and pay for the shares in goods and not in cash. There was no distinct evidence that this offer was accepted. The shares applied for were, however, in fact allotted to him and placed in his name; and although no notice of the allotment was sent to him, there was evidence to show that he was aware that shares had been given to him. It was nevertheless held that no concluded agreement had been entered into, and that the applicant had not become a shareholder.

Shackleford's
 case.

The conditions, moreover, must be assented to by those who are competent to bind the company (see Book II., c. 2). Therefore, where a person applied for shares upon certain terms which were assented to by the manager and two directors, when by the constitution of the company three directors were required to bind the company, it was held that there was no binding agreement, although the board of directors had delegated the allotment of shares to the manager and the two directors in question (l).

It is a necessary consequence of the same principle that if

(g) *Onion's case*, 1 Sim. N. S. 394. See, too, *Mainwaring's case*, 2 De G. M. & G. 66.

(h) See *infra*, Bk. IV. c. 1, § 13, under the head Contributories.

(i) *Beck's case*, 9 Ch. 392. See,

also, *Wynne's case*, 8 Ch. 1002.

(k) 1 Ch. 567. See, also, *Rogers' case*, 3 Ch. 633; *Tomlin's case* [1898], 1 Ch. 104.

(l) *Howard's case*, 1 Ch. 561.

the conditions are such that the company cannot lawfully assent to them there is no binding agreement (*m*). Bk. I. Chap. 1.
Sect. 1.

An application for shares upon terms not assented to must not be confounded with an application for shares upon conditions which are assented to but are not performed. In the first case, there is no agreement at all; in the second case, there is a concluded agreement, and its effect with reference to the question whether the applicant has become a member or not, turns on other considerations; viz., 1. Has the condition been performed? if not, then 2. Is the condition precedent or subsequent with reference to becoming a member? if precedent, then 3. Has the performance of it been waived? These matters will be more fully discussed when membership is being examined.

Agreements to take shares can be enforced by action; but it is a well settled principle of the Law of Partnership (*n*) that an agreement to share profits does not create a partnership so long as anything remains to be done before the right to share them accrues. It consequently follows that neither the projectors of, nor the subscribers to, a company in course of formation are partners (*o*); nor are they, simply by reason of their position as projectors or subscribers, liable for each other's acts as if they were partners (*p*). It becomes therefore important to distinguish clearly a company which is formed from one which is being formed; and this is by no means always an easy matter (*q*). When indeed a company is incorporated by special Act of Parliament, by charter, or by registration, the moment of its formation is coincident with the date of its incorporation, and is accurately determinable;

Effect of an
agreement to
take shares.

Forming and
formed com-
panies.

(*m*) See *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54 & 222;

Stace and Worth's case, 4 Ch. 682;

Pellatt's case, 2 Ch. 527; *Bunn's*

case, 2 De G. F. & J. 275. Compare

Ex parte Sandys, 42 Ch. Div. 98,

where though the original contract

to take shares could not have been

enforced, yet a subsequent assent

to take the shares was implied from

the allottee having dealt with them

as a member of the company.

(*n*) Part. p. 18 *et seq.*

(*o*) *Ib.* and *infra*, Bk. II. c. 1,
sec. 1.

(*p*) *Ib.* and *infra*, Bk. II. c. 1,
sec. 1.

(*q*) As to when the formation of
a company can be said to have been
commenced, see *Baker v. Plaskitt*, 5
C. B. 262.

Bk. I. Chap. 1. but where a company is not incorporated it is often difficult
Sect. 2. to fix the time at which the agreement to form it became replaced by a contract of present partnership. The test is whether anything still remains to be done before the relation of partners is created (r).

SECTION 2.—OF THE PROSPECTUS AND DEPARTURES FROM IT.

Prospectus.

One of the first steps in the formation of a company is the publication by its projectors of a prospectus, setting forth the nature and objects of the proposed company, the number and value of the shares intended to be created, the amount of capital supposed to be required, and the terms, as to the sums to be paid on application, allotment or otherwise, upon which applications are to be made (s). The public is invited to subscribe to the company thus proposed to be formed: in other words, persons are invited by advertisements, circulars, &c., to enter into an agreement to take shares in a company, such as that described, when the same shall have been formed. Those who sign such an agreement, whether by themselves or by their agent (t), become subscribers to the undertaking in the proper sense of the word (u). But a statement in the prospectus that certain persons will take certain shares in the company is not sufficient evidence of an agreement between them and the company so as to bind them to take such shares, even though the persons referred to are directors of the company and the prospectus is issued by them after the company has come into existence (x).

(r) Part. p. 15 *et seq.* and *infra*, Bk. II. c. 1.

(s) It is to these terms that an application for shares "on the terms of the prospectus" refers. See *Ex parte Badman* and *Ex parte Bosanquet*, 45 Ch. D., p. 25.

(t) *Re Whitley Partners, Ltd.*, 32 Ch. D. 337.

(u) *Burke v. Lechmere*, L. R. 6 Q. B. 297; *Thames Tunnel Com-*

pany v. Sheldon, 6 B. & C. 341, decided that a person who had signed nothing, but had applied for shares and had paid a deposit on those allotted to him, was not a subscriber within the meaning of an Act incorporating the subscribers to a projected company.

(x) *In re Moore Brothers & Co., Ltd.* [1899], 1 Ch. 627.

The prospectus issued to the public must, in the absence of evidence to the contrary, be regarded as the basis of the agreement which results from an application for shares by a person who has seen the prospectus, and an allotment to him (y). Hence, if a person applies for shares in a company upon the faith of a prospectus issued by its promoters or directors, and he receives in answer to his application an allotment of shares in a company to which the prospectus does not apply, he is at liberty to decline to accept such shares; for they are not in truth what he asked for. Nor will even payment of a deposit by him upon the shares allotted be conclusive evidence against him of an assent by him to take the shares allotted; for he is entitled to assume that he has received what he applied for; and unless it can be shown that when he paid the deposit he did not act on that assumption, he is, notwithstanding such payment, entitled to say he has entered into no binding contract (z).

Bk. I. Chap. 1.
Sect. 2.

Prospectus not
adhered to.

Effect of paying
for shares
allotted when
different from
those asked for.

The following are leading cases on this head.

The prospectus of the *Merionethshire Slate and Slate Slab Company* stated the objects of the company to be to work a particular slate quarry in Wales. The company was formed for the purpose of working not only that quarry, but any slate quarry in Great Britain or Ireland. It was held that a person who had applied for shares on the faith of the prospectus, and had on his application agreed to execute the company's deed of settlement, and had had shares allotted to him, and had paid a deposit upon their allotment, was nevertheless not bound to take such shares. He never had, in fact, agreed to take shares in such a company as was ultimately formed (x).

Merionethshire
Slate Company.

The prospectus of the *Scottish and Universal Finance Bank*, issued before the company was formed, described the objects of the company to be general banking purposes, and the purchase, importation, and exportation of specie. The objects of the company as formed went far beyond this, and included,

Scottish Finance
Bank.

(y) See *Pulford v. Richards*, 17 Beav. 87; *Jennings v. Broughton*, ib. 234; *Fox v. Clifton*, 6 Bing. 776, *infra*, p. 25. Compare *Gerhard v. Bates*, 2 E. & B. 476.

(z) *Downes v. Ship*, L. R. 3 H. L. 356, 358, and *Blackburn's case*, 3 Drew. 409, noticed *infra*, p. 29.

(a) *Rye's case*, 3 Jur. N. S. 460, V.-C. S.

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amongst other things, obtaining concessions for the construction of railway and other works, and the leasing or working such undertakings, and the transaction of the business of a merchant, contractor, and capitalist, as principal or agent in any part of the world. It was held, first by the V.-C. Wood, and afterwards by the Court of Appeal, that a person who applied for shares on the faith of the prospectus, and to whom shares were allotted, had not agreed to become a member in the company; he never having been aware that the company was formed for purposes so materially different from those stated in the prospectus (*b*).

Russian Iron
Company.

The prospectus of the *Russian Vyksounski Iron-works Company*, issued before the company was formed, stated that the objects of the projected company were to acquire, work, and extend certain specified iron-works in Russia. The objects of the company as formed were to acquire and work iron mines and works in Russia generally, and to work mines, build ships, forge, cast, and roll iron, to construct wrought and cast iron work, and to manufacture all kinds of engines and engineering work. It was held, in this case also, that applicants for shares on the faith of the prospectus, and to whom shares had been allotted, but whose attention had never been drawn to the variance between the objects of the company as formed and those advertised, were at liberty to repudiate their shares on discovering the variation (*c*).

The Scottish
Petroleum
Company.

Anderson's case.

The prospectus of the *Scottish Petroleum Company* named G. and R. as two of the directors. Anderson, on the faith of this statement, applied for shares in the company, but before any shares were allotted to him both G. and R. had refused to be appointed directors. It was held that Anderson under these circumstances was at liberty to repudiate the shares allotted to him (*d*).

(*b*) *Ship's case*, 2 De G. J. & Sm. 544, and *Downes v. Ship*, L. R. 3 H. L. 343.

(*c*) *Stewart's case*, 1 Ch. 574; *Webster's case*, 2 Eq. 741.

(*d*) *Anderson's case*, 17 Ch. D. 373; distinguishing *Hallows v.*

Fernie, 3 Ch. 467; and see *In re Scottish Petroleum Co.*, 23 Ch. D. 413. And compare *Smith v. Chadwick*, 20 Ch. D. 27, and 9 App. Ca. 187, where no reliance was, in fact, placed on the name of the director in question.

The prospectus of the *Metropolitan Coal Consumers' Association*, issued by the promoters before the incorporation of the company, contained a statement which was held to mean that two persons named therein had consented to become members of the council of administration of the company when formed, and had authorised the publication of their names as members. Karberg, on the faith of this statement, applied for shares; the statement was untrue, and the two persons named never became members of the council. It was held that Karberg was at liberty to repudiate the shares allotted to him (c).

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The Metro-
politan Coal
Consumers'
Association.
Karberg's case.

Many cases under the older winding-up Acts illustrate the same principle, and may still be usefully referred to where the right to repudiate is not lost by reason of the winding up of the company (f).

Other illustrations of the same principle are afforded by those cases in which the liability of subscribers to projected companies for debts contracted by the directors has been discussed. These cases establish that persons who agree to become members of a company to be formed upon certain terms and for certain purposes are not liable for debts contracted by the directors before the company is formed as contemplated; unless the subscribers have rendered themselves liable to such debts otherwise than by their agreement to take shares.

Companies
starting too
soon.

Thus in *Fox v. Clifton* (g), it was held that the defendants who had applied for shares in a company, had had them allotted, and had paid a deposit in respect of them, were not partners with the projectors of the company, inasmuch as the company in which alone the defendants had agreed to become partners was never in fact formed. The capital was never

Fox v. Clifton.

(c) *Karberg's case* [1892], 3 Ch. 1; *Wainwright's case*, 62 L. T. N. S. 30, and 63 L. T. N. S. 429. These cases and that of *Hal- lows v. Fernie*, 3 Ch. 467, were argued and decided on the ground of misrepresentation rather than of departure from the prospectus.

(f) *Cox's case* and *Naylor's case*, 4 K. & J. 308 & 314; *Goldsmid's case*,

16 Beav. 262; *Meyer's case*, ib. 383.

(g) 6 Bing. 776. See, also, *Bourne v. Freeth*, 9 B. & C. 632; *Pitchford v. Davis*, 5 M. & W. 2; *Vice v. Anson*, 7 B. & C. 409. *Perring v. Hone*, 4 Bing. 28, so far as it decided that persons become partners by subscribing to an inchoate company, must be regarded as overruled by *Fox v. Clifton*.

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subscribed, only a few shares were ever taken up, the deed was only signed by a comparatively few persons, and by one only of the defendants. The time fixed for its execution had elapsed, and it was expressly declared in the prospectus of the company, which prospectus was held to form the basis of the contract into which the defendants had entered, that every person who should neglect to execute the deed within the time fixed should forfeit all share and interest in the company. In answer to the argument that the defendants had become shareholders in a *de facto* existing company by payment of the deposits, it was observed by the Court:—

Effect of paying
deposit.

“the paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement; that is, an assent to become partners in a company raising a capital of 600,000*l.* consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future; but we think it implies nothing more, and that it cannot be construed as an assent to the terms of a partnership already formed. When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7,500; when, out of that number, no more than 2,300 ever paid the first instalment; when not half the latter number paid the second instalment, and only sixty-five subscribers signed the deed; we think the subscribers were at liberty to say, This was not the trading company upon which we paid our deposit; neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest ‘in the concern’ upon their refusal to execute the deed; which loss they appear to have submitted to.”

Change of
scheme autho-
rised or ratified.

The foregoing cases must be carefully distinguished from those in which the applicant has authorised or sanctioned an allotment of shares to him, with notice of a difference between the objects of the company as described in its prospectus and its objects as ultimately fixed by the instrument creating the company.

Change of
scheme autho-
rised by special
agreement.

Where there is a special agreement to take shares, and the company as described in the agreement differs in character or purpose from that described in the prospectus, the agreement must, in the absence of fraud, be regarded as expressing the contract into which the parties have entered; and to the extent to which the agreement and prospectus differ from each

other the terms of the prospectus must be considered as excluded by those of the agreement (*h*). Bk. I. Chap. 1.
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Persons who subscribe to projected companies which are to be incorporated by Act of Parliament or by charter, frequently give the managers very extensive powers, and bind themselves to take shares in almost any company which the managers may be able to induce the legislature or the Crown to incorporate, and which is not altogether of a different nature from that proposed. When this is the case, and a company is formed, the subscribers will be bound to take shares, and will be converted into shareholders, if the Act or charter so declares, although the company actually formed differs both in object and constitution from that to which they subscribed (*i*). Change of
scheme autho-
rised by form of
application.

In the *Midland Great Western Railway Company v. Gordon* (*i*), a prospectus was issued for the formation of a company to construct a railway from Dublin to Mullingar and thence to Athlone. The directors were authorised to apply to Parliament for an Act, and to do all that was necessary for forming a railway as proposed. Scrip certificates for shares were issued, and the defendant subscribed for ten shares. The directors obtained an Act incorporating the company, authorising it to make a railway from Dublin to Mullingar only, and to purchase a canal existing between Mullingar and Athlone, and to work such canal. The Act provided that every one who should have subscribed to the undertaking or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder. The defendant had sold his scrip, but he was nevertheless registered by the company as a shareholder, and he was held to be a shareholder notwithstanding his contention that the company actually formed was materially different from that to which he had subscribed (*k*). Midland, &c.
Rail. Co. v.
Gordon.

Again, where a banking company was projected with a capital of 1,000,000*l.* to be trebled if necessary, and the subscribers signed an agreement reciting that application had Norman v.
Mitchell.

(*h*) *London and Continental Assurance Soc. v. Redgrave*, 4 C. B. N. S. 524, and the next note.

(*i*) 16 M. & W. 804.

(*k*) *Nixon v. Brownlow*, 2 H. & N. 455, and 3 ib. 686, and *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414, are similar cases.

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been made to the Crown for a charter and nominating certain persons with power to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisitions of the Crown, and to narrow or extend the objects of the company as might be necessary, it was held that a charter incorporating the subscribers with a capital of 644,000*l.* with power to increase it to 1,000,000*l.*, with the consent of the Lords of the Treasury, was one which the directors had authority to accept, and that the subscribers were bound by it (*l*).

Change of
scheme autho-
rised by Act of
Parliament.

Even where the subscribers' agreement is less general in its language, the terms of the Act of Parliament incorporating the company may be such as to convert the subscribers to a company of a particular description into shareholders in another company materially different from it. A construction of the Act leading to such a result is to be avoided if possible; but if its language is clear and precise no court can lawfully decline to give effect to it, nor hold that a person expressly made a shareholder by the legislature is not a shareholder to all intents and purposes (*m*). When two companies are amalgamated by an Act of Parliament which enacts that the shareholders of the old companies shall be entitled to shares in the new company, nothing more is required to make them members thereof (*n*).

Change of
scheme
subsequently
assented to.

A person who has applied for shares and has had them allotted to him under circumstances which entitle him to reject them, may nevertheless elect to retain them; and this election may be evidenced not only by an express agreement but by conduct. It need hardly be added that if a person knowing the circumstances which entitle him to reject shares which have been allotted to him retains them without objection, and acts as if he were a shareholder, it will be too late for him afterwards to repudiate them upon the ground that they were not what he applied for, or upon the ground that the

(*l*) See *Norman v. Mitchell*, 5 *High Peak Co. v. Lacey*, 3 Y. & J. 80; *Scott v. Berkeley*, 3 C. B. 925.
278.

(*n*) *Spackman v. Lattimore*, 3 Giff.

(*m*) See *Kidwelly Canal Co. v. Raby*, 2 Price, 93; *Cromford and Co. v. Paterson*, 18 C. B. 414.

terms of the company's prospectus have not been adhered to (o). 11k. I. Chap. 1.
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But although a person may acquiesce in a change in the objects of a company, yet, where those objects are changed after an application for shares and before the allotment of them, and the attention of the applicant is not drawn to the change, and he is really ignorant of it, the mere fact that he receives the shares and pays the deposit on them, will not preclude him from denying that he ever agreed to take them (p). Allotment with
alleged notice
of change in
scheme.

The same principle applies to registered companies ; and it has been decided that the mere circumstance that the applicant receives a letter of allotment or certificate stating that the shares are to be held subject to the company's memorandum and articles of association is not enough to call his attention to a material difference between the prospectus on the faith of which he applied for shares, and the memorandum of association which fixes the objects of the company (q).

But the strong tendency of modern decisions is that as regards companies formed under the Companies Act, 1862, an allottee of shares who does not inform himself of the contents of the memorandum of association within a reasonable time, and who keeps the shares allotted to him without taking the trouble to ascertain whether there is any discrepancy between the prospectus and the memorandum of association, cannot afterwards repudiate the shares (r). In the application, however, of this rule, it is important to distinguish cases in which Delay in
repudiation.

(o) See *Tredwen v. Bourne*, 6 M. & W. 461 ; *Peel v. Thomas*, 15 C. B. 714 ; *Steigenberger v. Curr*, 3 Man. & Gr. 191 ; *London and Continental Assurance Co. v. Redgrave*, 4 C. B. N. S. 524. Compare these cases with those on p. 25, note (g).

(p) *Blackburn's case*, 3 Drew. 409. This case was reversed on appeal (8 De G. Mac. & G. 177) ; but the principle on which it was decided by the Vice-Chancellor remains unimpeached. On the appeal additional evidence was adduced and

the Court was satisfied that when Blackburn paid his deposit he must have known what shares he was taking.

(q) *Webster's case*, 2 Eq. 741 ; *Ship's case*, 2 De G. J. & Sm. 544. See, also, *Beck's case*, 9 Ch. 392, where the allottee was registered.

(r) See the judgments in *Peel's case*, 2 Ch. 674 ; *Lawrence's case* and *Kincaid's case*, ib. 412 ; *Wilkinson's case*, ib. 536 ; also in *Downes v. Ship*, L. R. 3 H. L. 343, and *Oakes v. Turquand*, 2 ib. 325.

Bk. I. Chap. 1. the allottee repudiates his shares before the company is being
Sect. 2. wound up from those in which he does not (s). The following cases, which arose before any winding up had commenced, may be usefully referred to on this head.

Repudiation in time.

Stewart's case.

In *Stewart's case* (t) the application to be removed from the list was successful although twelve months had elapsed since the allotment of shares, and the allottee had in the interval tried to sell them, and had attended a meeting called for the express object of altering a clause in the articles relating to the increase of capital beyond the amount stated in the prospectus: but both the V.-C. Wood and the Court of Appeal held that these circumstances did not preclude the shareholder from having his name removed, it being clearly proved that he, in fact, knew nothing of the great change which had been made in the objects of the company (u).

Webster's case.

In *Webster's case* (x), which was another in the same company, the allottee had exchanged the banker's receipt for a certificate that he was the proprietor of fifteen shares "subject to the provisions of the memorandum and articles of association": but even this and the lapse of one year after the allotment, and ten months after the receipt, were held not to deprive him of his right to be removed.

Nichols' case.

Nichols' case (y). A prospectus of a projected company stated (in effect) that its objects were to rear poultry, and to enable consumers to buy eggs and poultry at half the usual price. The prospectus stated that the articles of association might be seen at the company's office; but neither the prospectus nor the articles referred to the memorandum of association. On the faith of this prospectus, application was made by Nichols for shares, and they were allotted to him. Shortly afterwards the company was registered, and by its memorandum of association its objects were stated, to be not only to rear poultry and deal in poultry and eggs, but also

(s) Compare with the cases referred to in the next notes, *Pret's case*, 2 Ch. 674; *Hare's case*, 4 Ch. 503.

(t) 1 Ch. 574, *ante*, p. 24. See, also, *Wyn's case*, 8 Ch. 1002, and *Beck's*

case, 9 ib. 392.

(u) Compare *Ex parte Briggs*, 1 Eq. 483.

(x) 2 Eq. 741.

(y) W. N. 1867, 77.

“the dealing in game and wild birds, the cultivation and growth of vegetables, fruit, and agricultural produce, the acquisition, use, or sale of inventions for artificial hatching, the preservation of poultry or meat, and any other purpose connected with the business of the company, and the carrying on the businesses of poulterers, egg merchants, dealers, market gardeners, and farmers.” Nichols took no part in the proceedings of the company, and did nothing whatever except pay for the shares on allotment. A year after the allotment he, for the first time, became acquainted with the objects of the company as formed, and he at once repudiated his shares. The V.-C. Wood removed his name from the register of shareholders, being of opinion that there was nothing to put Nichols on inquiry, and that under those circumstances the time which had elapsed since the allotment of shares was immaterial.

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In *Baily's case* (z), a person applied for shares, and paid the deposit on them; the company was afterwards registered, and it issued another prospectus, materially differing from the first; the shares were then allotted, but this was some months after the application for them; the allottee declined to accept them, and asked for his money back; nothing further was done for eighteen months, when a call was made upon him; he then applied to have his name struck off the register of shareholders, and it was ordered to be struck off. This case is instructive, not only on the effect of delay after repudiation (a), but as showing, that even although the memorandum of association and the prospectus may not vary, still a material departure by the company from the prospectus on the faith of which shares are applied for, entitles the applicant to decline to accept them.

Baily's case.

On the other hand, where a person knowing the change of the objects of the company delays to repudiate his shares, he will be treated as electing to hold them, and any subsequent attempt to repudiate them will be unsuccessful; and a delay of four months has been held fatal, even although during that time the shareholder had done nothing which was inconsistent

Repudiation
too late.

(z) *Ex parte Baily*, 3 Ch. 592, 503, where the company was being wound up. and 5 Eq. 428.

(a) Compare *Hare's case*, 4 Ch.

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with his repudiation (*b*). But the onus of proving such knowledge is on the persons who made the misrepresentation, and proof by them that a letter containing a notice of the misrepresentation was sent to the registered address of the person seeking to repudiate his shares is not sufficient to fix him with notice of the misrepresentation, if in fact he had no knowledge of the letter (*c*). It need hardly be observed, that if after knowledge of the facts entitling a person to repudiate his shares he acts as a shareholder, *e.g.*, by attending meetings, paying calls, or attempting to sell his shares, his right to repudiate them will be at an end (*d*). Further, if a shareholder knowing of one ground of variance, or having his suspicions aroused, chooses to abandon his right to repudiate on that ground, it will be too late for him afterwards to repudiate his shares on the ground of some other variance, and he will be a contributory (*e*). So will delay be fatal if it occurs after the right of the shareholder to repudiate his shares is denied (*f*).

Application for
shares after a
company is
formed.

In all the foregoing cases it will have been observed that the application for shares preceded the formation of the company. Where a company is actually formed, and a person afterwards applies for shares in it, and they are allotted to him, an agreement between him and the company is thereby concluded, and in the absence of fraud is binding on both parties. In such a case a definite thing is applied for, *viz.*, a share in an existing company, the objects of which are defined by the Company's Act of Parliament or memorandum of association, with which he can make himself acquainted; the thing applied for is acquired; the contract, therefore, is complete, and can only be impeached, if at all, for fraud (*g*).

(*b*) *Laurence's case*, 2 Ch. 412;
Kincail's case, *ib.* See, also, *Wil-*
kinson's case, 2 Ch. 536.

(*c*) *In re London and Staffordshire*
Fire Insurance Co., 24 Ch. D. 149.

(*d*) See *Ex parte Briggs*, 1 Eq.
483, and *Ex parte Sandys*, 42 Ch. D.
98, where the person seeking relief
though she knew the facts, *viz.*,
that the shares had been issued at
a discount, was ignorant of the legal
consequences.

(*e*) *Whitehouse's case*, 3 Eq. 790.

(*f*) *Taite's case*, 3 Eq. 795.

(*g*) See Lord Cairns's judgment in
Peel's case, 2 Ch. 684, and the judg-
ments in *Kisch v. Central Railway*
of Venezuela, 3 De G. J. & S. 122,
and L. R. 2 H. L. 99; *Oakes v.*
Turquand, *ib.* 325; and see as to
the immateriality of altering the
articles of association, *Lyon's case*,
35 Beav. 646; and compare *Felgate's*
case, 2 D. J. & S. 456.

If a person intending to take shares in company A. applies for and receives shares in company B. under a mistaken belief that company B. is company A., and this belief is known to and fostered by company B., there is no contract, and he can repudiate the shares even after company B. has gone into liquidation (*h*).

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Mistake in
identity of
company.

The subject of fraudulent prospectuses will be referred to hereafter (see Book I., c. 3).

SECTION 3.—OF THE RETURN OF SUBSCRIPTIONS TO COMPANIES, ON THE GROUND OF FAILURE OF CONSIDERATION.

Before leaving the subject discussed in the foregoing pages, it will be convenient to consider the circumstances under which an allottee of shares, who has paid a deposit upon them, has a right to have this deposit returned, upon the ground that the consideration for its payment has failed. His right to be relieved on the ground of fraud will be considered hereafter.

It has been decided by the House of Lords, that if a number of persons, meaning to join in a common undertaking, raise a common fund, eventually to be increased, but commencing by a deposit, and they put these deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one or more of the subscribers against the will of the others to withdraw and say, "I think, or we think, you ought not to go any further." Any one subscriber who is not of that opinion has a right to say, "I gave my money upon the faith that we all embarked in one common undertaking, and till that has been done, which we agreed should be done, none have a right to withdraw and say you shall not go any further" (*i*). It follows from this,

Subscriber to a
scheme not at
liberty to retire
from it.

(*h*) *Baillie's case* [1898], 1 Ch. H. L. C. 497; compare *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49. As to the right of scrip holders to have the money subscribed by them applied to the purposes for which they subscribed

(*i*) *Baird v. Ross*, 2 Macqueen, 61. See, too, *Burnes v. Pennell*, 2

L.C.

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that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company upon the terms assented to by him (*k*) has been abandoned or has become in a business sense impracticable.

Unless it has failed.

But further, when a person applies for shares and has them allotted to him, a contract is entered into between him and others, and before any question as to failure of consideration can be discussed, the terms of this contract must be examined for the purpose of ascertaining precisely for what the deposit was paid (*l*). If the contract shows that the deposit was paid for a share in a company to be formed for certain purposes and upon certain conditions, and no such company is formed, and the time for its formation (which, if no time is limited, must be taken to be a reasonable time) has elapsed, then the consideration for which the deposit was paid has failed, and the deposit is returnable, unless the original contract has been varied with the consent of the subscriber of the deposit. But if the contract shows that the deposit was made for some other purpose (*e.g.*, for the purpose of being employed in attempting to start the company), then the circumstance that the company has not been and cannot be formed, is no reason why the deposit should be returned.

1. Subscribers to abortive companies not liable for expenses incurred in attempting to form them.
Nockells v. Crosby.

The leading case in support of the first of these propositions is *Nockells v. Crosby* (*m*). There the defendants, in circulars published by them, had proposed to receive subscriptions of 10*s.* a week for the space of one year, and to invest these subscriptions and to divide the interest twice a year equally amongst the subscribers or the survivors of them. The plaintiff subscribed

it, see *Bagshaw v. The Eastern Union Rail. Co.*, 7 Hare, 114, and 2 Mac. & G. 389.

(*k*) See *Johnson v. Goslett*, 18 C. B. 728, and 3 C. B. N. S. 569, and see, also, *Collingham v. Sloper* [1893], 2 Ch. 96, and *Wilson v. Church*, 13 Ch. D. 1, and S. C. under the name of *National Bolivian Navigation Co. v. Wilson*, 5 App. Ca. 176.

(*l*) Hence in an action for the

recovery back of the deposit, the letter allotting the shares in respect of which the deposit was paid, must be produced. *Clarke v. Chaplin*, 1 Ex. 26. The defendants will, if necessary, be ordered to produce the agreement between them and the plaintiff. *Steadman v. Arden*, 15 M. & W. 587.

(*m*) 3 B. & C. 814.

to this scheme, but there not being a sufficient number of other subscribers nothing was ever invested, and the defendants came to a resolution to proceed with it no further, and to return to each subscriber the amount of his subscription, less a per-centage for expenses incurred. The plaintiff demanded to have the whole amount subscribed by him returned, and he brought an action against the defendants for its recovery and was held entitled to a verdict. He had subscribed his money for one purpose only; it had not been applied, nor was there any longer any intention to apply it for that purpose, and it was therefore the duty of the defendants to return it to him in full. The judgment of Littledale, J., upon the right of promoters of abortive schemes to charge the subscribers with expenses is particularly valuable, and was as follows:—

“I also am of opinion that the plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation, must in the first instance be borne by them. When it is in actual operation, the expenses and charge of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way, for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff's sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the bankers. Suppose there had been no subscribers, the projectors must have paid all the expenses. If, then, one person only subscribes, are all those expenses to be cast upon him? The hardship and injustice would be monstrous, yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expenses incurred by these defendants. With respect to the supposed partnership, it is plain that there could be none until the money was laid out in execution of the proposed scheme. I am, therefore, clearly of opinion that the plaintiff was entitled to recover.”

This case has been constantly recognized and followed (*n*). Other cases. The principle applies, whatever the object of the company when established may be; and to companies formed on the cost-book system as well as to the others (*o*). Moreover, if

(*n*) See *Walstab v. Spottiswoode*, 15 M. & W. 501; *Moore v. Garwood*, 4 Ex. 681; *Ashpitel v. Sercombe*, 5 Ex. 147; *Coupland v. Challis*, 2 Ex. 682; *Owen v. Challis*, 6 C. B. 115; *Ward v. Londesborough*, 12 C. B. 252; *Mowatt v. Londesborough*, 3 E. & B. 307, and 4 ib. 1.

(*o*) *Johnson v. Goslett*, 18 C. B. 728, and 3 C. B. N. S. 569. In this

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an allottee of shares undertakes to sign some deed which is referred to, and that deed is not in existence; but a deed, said to be the one referred to, is afterwards prepared, he is not bound to execute that, if it is inconsistent with the contract into which he has already entered. Consequently, where a person applied for shares in a projected railway and paid his deposits, and undertook to sign the parliamentary contract and subscribers' agreement, and a deed was afterwards prepared authorising the promoters of the company to apply the deposits in defraying preliminary expenses, it was held, that this was not such a deed as it was obligatory upon the allottee to execute, and that, the company having proved abortive, he was entitled to recover his deposits, although it would have been otherwise had he executed the deed (*p*).

No lien for
deposit.

Even where, upon the foregoing principles, a subscriber is entitled to have his deposit returned he has no lien for it, and cannot restrain other creditors from attaching it (*q*).

Calls on
subscribers
to abortive
companies.

It need hardly be observed that, if a person has agreed to pay a deposit in respect of certain shares, and the consideration for his agreement has failed, he is not compellable to pay the deposit (*r*). But if a person undertakes to pay deposits by a certain day, it is no defence to an action for not paying them on or before that day, that since that day the projected company has become abortive; for, perhaps, that would not have been its fate if the subscriptions had been paid as promised, and *ex hypothesi*, the promise was broken before the circumstances relied on as an excuse for its breach occurred (*s*).

2. Deposits not
returnable when
paid to cover
preliminary
expenses.

In the cases referred to above, the deposits were held returnable upon the ground that they had been paid for one purpose only, and that such purpose had become unattainable. In those about to be referred to, the deposits were held not

case the company was actually at work, and its formation had never been abandoned. But its formation, on the terms originally agreed upon was abandoned, and the plaintiff had not assented to any others.

(*p*) *Ashpittel v. Sercombe*, 5 Ex. 147.

(*q*) *Moseley v. Cressey's Co.*, 1 Eq.

405.

(*r*) *Duke v. Andrews*, 2 Ex. 290.

(*s*) *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356; *Aldham v. Brown*, 7 E. & B. 164, and on appeal, 2 E. & E. 398; see *Woolmer v. Toby*, 10 Q. B. 691, as to who ought to sue in such cases.

returnable, although the company subscribed to had proved abortive; for the contract of the parties showed that the deposits were properly applicable in discharge of the expenses incidental to the attempt to form the company (t). Bk. I. Chap. 1.
Sect. 3.

Garwood v. Ede (u) is a case of this description. There the plaintiff had paid deposits on shares in a projected railway, and had signed a deed which authorised the promoters to defray the expenses incidental to the undertaking out of the deposits paid for shares (x). Under these circumstances it was held that, although the scheme for the railway proved abortive, the deposits paid by the subscribers for shares in it were not returnable. Garwood v. Ede.

Clements v. Todd (y) was decided on the same principle; for although the plaintiff had not signed any such deed as that signed in the last case, there was a deed which he had undertaken to sign, and he had accepted scrip certificates which stated that he had signed it. He was therefore held to have authorised the application of his deposits in the discharge of preliminary expenses, as mentioned in the deed. Clements v.
Todd.

Jones v. Harrison (z) is another instance of the same kind, only the authority to defray preliminary expenses out of the deposits was conferred by the terms of the letter of allotment, and not by any deed intended for execution after the allotment was made. Jones v.
Harrison.

Upon precisely the same principle it was held in the more recent case of *Aldham v. Brown* (a), that where a person had covenanted to pay a deposit which was to be applicable, amongst other things, to the discharge of the expenses of forming a company, he was bound by his covenant, and was liable to an action upon it, although, before the action was brought, the formation of the company had become impossible. Aldham v.
Brown.

(t) See *Baird v. Ross*, 2 Macqueen, 68, 69.

(u) 1 Ex. 264; see, too, *Watts v. Salter*, 10 C. B. 477; *Vane v. Cobbold*, 1 Ex. 798; *Atkinson v. Pocock*, ib. 796.

(x) Meaning the preliminary expenses. See *Willey v. Parratt*, 3 Ex. 211; *Baird v. Ross*, 2 Macqueen, 69.

(y) 1 Ex. 268; compare *Ashpitel v. Sercombe*, 5 Ex. 147; *Sibson v. Edgworth*, 2 De G. & Sm. 73.

(z) 2 Ex. 52; see, too, *Willey v. Parratt*, 3 Ex. 211; *Baird v. Ross*, 2 Macqueen, 61.

(a) 7 E. & B. 164, and 2 E. & E. 398; see, too, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356.

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Cases in which
deposits have
been held
returnable
although the
company's deed
has been signed.

The cases of *Garwood v. Ede* (b), and *Watts v. Salter* (c), which decided that a person who had paid deposits and executed a deed authorising their application in payment of preliminary expenses, could not recover the deposits so paid, are not to be regarded as authorities for the proposition that the execution of such a deed necessarily, and under all circumstances, precludes the recovery back of the deposits. If the execution of the deed has been induced by fraud, the right to recover the deposits is unaffected by such execution (d); and although it was said in *Watts v. Salter* that in the absence of fraud, the deed, and that alone, regulated the rights of the contracting parties, yet this doctrine has not altogether met with approbation: and in a later case, where the promoters of a railway company had in their circulars and letters of allotment expressly undertaken to return the deposits in full, if the necessary Act of Parliament could not be obtained, it was held, first by the Court of Queen's Bench, and afterwards by the Exchequer Chamber, that the deposits paid were recoverable in full, even by persons who had executed a deed whereby it was expressly stipulated that the promoters should be indemnified out of the funds of the company and by the subscribing shareholders against all expenses (e). The promoters, in order to induce persons to take shares, to pay deposits, and execute the deed, promised to return all deposits in full in a given event: and it could never have been intended that a person by executing the deed should lose the benefit of that promise.

Evidence in
actions for the
recovery back
of deposits.

Before leaving this subject, it may be as well to observe that in order that an action for the recovery back of deposits may be successful, the plaintiff must prove that the money he seeks to recover was paid to the defendants or to their agents. For, in the absence of such proof, however clear the right of the

(b) 1 Ex. 264.

(c) 10 C. B. 477.

(d) *Wontner v. Shairp*, 4 C. B. 404; *Jarrett v. Kennedy*, 6 C. B. 319; compare *Vane v. Cobbold*, 1 Ex. 798; and *Atkinson v. Pocock*, ib. 796; *Watts v. Salter*, 10 C. B.

477.

(e) *Mowatt v. Lord Londesborough*, 3 E. & B. 307, and 4 ib. 1. In this case interest on the deposit had been demanded, and was recovered, from the time of the demand.

plaintiff may be to have his money back, he will have established no case against the individual from whom he seeks to recover it.

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In *Nockells v. Crosby*, *Walstab v. Spottiswoode*, and the cases of that class already referred to (p. 34 *et seq.*), the plaintiff proved that he had paid his deposits to the bankers appointed by the defendants to receive them, and this was quite sufficient (*f*). But it must be borne in mind that the promoters of companies are not partners (*g*), and that in order that any particular promoter may be liable to return deposits paid into a bank to the account of the company, it must be shown that he authorised the bank to receive the deposits on the account to which they have been paid.

Evidence of the receipt of the money by the defendants.

Thus in *Watson v. The Earl of Charlemont* (*h*), the plaintiff brought an action against three persons to recover deposits paid by him for shares in an abortive company. The three defendants were members of the committee of management. The letter of allotment sent to the plaintiff was signed by the secretary to the company, and contained a list of banks into any of which deposits might be paid. The plaintiff had paid his deposits into one of these banks, and had received from the bankers a receipt on account of certain persons as trustees for the company. Only one of the defendants was amongst the persons on whose account the receipt of the money was thus acknowledged; and it was held that this evidence was insufficient to show a receipt by all the defendants, and the action therefore failed.

Watson v. Charlemont.

SECTION IV.—THE PROVISIONS OF THE COMPANIES ACT, 1900,
RELATING TO THE ALLOTMENT OF SHARES AND PROSPECTUSES.

Before quitting the subjects discussed in the previous sections of this chapter it will be convenient to refer to the provisions of the Companies Act, 1900 (*i*), which relate to the allotment of shares by companies registered under the Companies Act,

Origin and object of the provisions in the Companies Act, 1900.

(*f*) See, too, *Hayes v. Stirling*, 14 Ir. Com. Law Rep. 277; *Mutland's case*, 4 De G. M. & G. 769.

(*h*) 12 Q. B. 856. See, also, *Burnside v. Dayrell*, 3 Ex. 224; *Drouett v. Taylor*, 16 C. B. 671.

(*g*) See *Partnership*, p. 18 *et seq.*, and *infra*, Bk II. c. 1, sec. 1.

(*i*) 63 & 64 Vict. c. 48.

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1862, and to prospectuses relating to such companies. The provisions in question are founded upon the recommendations contained in the report of a departmental committee, appointed by the Board of Trade, of which Lord Davey was the chairman (*k*). The main object of these provisions is to afford some protection to the public against two most frequent causes of failure and loss—namely, the allotment of shares on an insufficient subscription of capital (*l*), and “the loading of the purchase money (when a company is formed to purchase an existing business) or the contract price (when a company is formed to construct and work an undertaking such as a railway), and the consequent over-capitalization of the concern” (*m*). The Act seeks to effect these objects by imposing certain restrictions on the allotment of shares when an appeal is made to the public for capital, and by requiring that such disclosure shall be made in the prospectus as will enable the public who are asked to subscribe “to get at the real and ultimate vendor, to strip the mask off the nominal vendor, and to ascertain to whom the price to be paid by the company is to go, how it is to be applied, what the real purchase money is, what expenses are to be paid, and what will be left to the company for working capital.” Previous to this Act the only statutory enactment affecting the obligation of disclosure in a prospectus was § 38 of the Companies Act, 1867 (*n*). This section was ill drafted and ill adapted to attain the objects at which it was aimed, and has been superseded and repealed by the Act of 1900 (*o*).

Application of
the Act.

The Companies Act, 1900, is confined to companies registered under the Companies Act, 1862 (*p*). It came

(*k*) See “Report of the departmental committee appointed by the Board of Trade to inquire what amendments are necessary in the Acts relating to joint stock companies registered with limited liability under the Companies Acts, 1862 to 1890,” and the draft bill in the Appendix thereto. The report is dated June 27th, 1895.

(*l*) § 6, which imposes restrictions

on the commencement of business, is also directed to this end.

(*m*) See the Report, pp. x. and xi.

(*n*) 30 & 31 Vict. c. 131, § 38.

This section and the decisions under it are noticed hereafter, Bk. I., c. 3, § 3.

(*o*) Companies Act, 1900, § 33.

(*p*) *Ib.*, § 30. See *infra*, pp. 128 *et seq.*

into operation on the 1st January, 1901 (*q*) ; but, although it is not retrospective, it applies, except as otherwise expressed, to all companies registered under the Companies Act, 1862, whether formed before or after the commencement of the Act (*r*).

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The section which imposes restrictions on the allotment of shares only applies to companies whose shares are offered to the public for subscription (*s*), and (except as to the provision which fixes the minimum sum payable on application) only applies to the first allotment of shares offered to the public for subscription (*t*). The section in question is § 4; it forbids an allotment of shares to be made unless the amount of "the minimum subscription" has been subscribed and the sum payable on application therefor has been paid to the company (*u*). The "minimum subscription" is the amount (if any) fixed by the memorandum or articles of association, and named in the prospectus as the minimum subscription upon which the directors (*x*) may proceed to allotment; if no such amount is so fixed and named the minimum subscription is the whole amount of the share capital offered to the public for subscription (*y*). Moreover, the minimum subscription is to be reckoned exclusively of any amount payable otherwise than in cash (*z*).

Restrictions on
allotment of
shares. § 4.

Minimum
subscription.

The amount payable on application on each share must not be less than 5 per cent. of the nominal amount of the share (*a*); this provision applies to all shares offered to the public for subscription, whether on the first allotment or subsequently.

Amount payable
on application.

If the foregoing conditions have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares must be repaid to them forthwith without interest. If any such money is not repaid within forty-eight days after the issue (*b*) of the prospectus, the directors of the company are jointly and severally liable to repay it with interest at 5 per cent. per

Return of
application
money if no
allotment.

- | | |
|---|--|
| (<i>q</i>) Ib., § 35. | of a director by whatever name he |
| (<i>r</i>) Ib., § 31. | is called; see § 30. |
| (<i>s</i>) § 4 (1). | (<i>y</i>) § 4 (1). |
| (<i>t</i>) § 4 (6). | (<i>z</i>) § 4 (2). |
| (<i>u</i>) § 4 (1). | (<i>a</i>) § 4 (3). |
| (<i>x</i>) Any person is a director within
the Act who occupies the position | (<i>b</i>) <i>I.e.</i> , it is presumed, the first
issue of the prospectus. |

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annum from the expiration of the forty-eight days. If the money has been lost, a director may escape liability if he proves (and the onus is on him) that such loss was not due to any misconduct or negligence on his part (c).

Waiver clause
void.

Any condition requiring or binding any applicant for shares to waive compliance with any of these requirements is void (d).

Allotment
voidable if
irregular.

Any allotment made to an applicant in contravention of the foregoing provisions is voidable at the instance of the applicant "within" one month after the holding of the statutory meeting of the company and not later, and is voidable notwithstanding the company is in course of being wound up (e).

Application of
§ 4 of the Act,
1900.

This reference to the statutory meeting may give rise to a difficulty. The meeting referred to is apparently that mentioned in § 12 of the Act; the reference cannot be to the first meeting which was required by § 39 of the Companies Act, 1867, for that section is repealed by the Act of 1900 (f). But § 12 only applies to companies limited by shares (g), while § 4, which contains the provisions in question, apparently applies to all companies registered under the Companies Acts which have a share capital, and therefore verbally includes unlimited companies (h), and companies limited by guarantee having a capital divided into shares (i). The application therefore of § 5 to companies of either of these latter classes presents considerable difficulty—possibly the Courts may solve the difficulty by holding that § 4 applies only to companies limited by shares (k). This question, however, is not likely to arise often,

(c) § 4 (4).

(d) § 4 (5).

(e) § 5 (1). As will be seen hereafter where a company is in liquidation it is, as a rule, too late to repudiate any shares that have been allotted. *Oakes v. Turquand*, L. R. 2 H. L. 325.

(f) § 33.

(g) For a definition of these companies, see Companies Act, 1862, § 8.

(h) Companies Act, 1862, § 10.

(i) *Ib.*, §§ 9 and 14.

(k) See, too, Companies Act, 1900,

§ 7. A similar difficulty arises under § 11 of the Act of 1900. There are indications to be found in other sections of the Act that the differences between the various classes of companies which may be registered under the Act of 1862 were lost sight of—e.g., § 10, though expressed in general terms, can only apply as to many of its provisions to companies having a share capital; the same remark applies to § 13. See also the reference to shareholders in § 23.

as companies of the classes referred to are not of frequent occurrence. Bk. I. Chap. 1.
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It is apprehended that a contract to take shares followed by an allotment in accordance with the provisions of § 4 is thenceforth binding both on the company and the allottee, notwithstanding the general provision in § 6 (l) that any contract made by a company, where there is an invitation to the public to subscribe for its shares, before the date at which it is entitled to commence business is provisional only and not binding until that date. Allotment when binding.

Any director who knowingly contravenes or authorises or permits the contravention of any of the above mentioned provisions is liable to make compensation to the company and to the allottee for any loss or damages thereby sustained and for costs incurred; proceedings to recover such compensation cannot be commenced after the expiration of two years from the date of allotment (m). Liability of directors for irregular allotment.

Whenever a company limited by shares makes any allotment of its shares, certain returns have to be filed with the registrar of joint stock companies within a month after allotment, and if these returns are not filed every director, manager, secretary, or other officer of the company who is knowingly a party to the default is liable to a penalty not exceeding 50*l.* for every day the default continues (o). Return as to allotment.

After some doubt it was decided, before the Companies Act, 1900, was passed, that a limited company might pay a reasonable sum to brokers by way of brokerage for placing its shares (p), but the better opinion seems to have been that such a company could not make any payment out of capital to a person for subscribing for or underwriting its shares (q). Brokerage and commission on underwriting shares.

(l) See § 6 (3) and (7).

(m) § 5 (2).

(o) See for the particulars of the returns required § 7. And form numbered 45 in the Order of the Board of Trade dated the 28th Dec., 1900.

(p) *Metropolitan Coal Consumers' Association v. Scrimgeour* [1895], 2

Q. B. 605; distinguishing *Faure Electric Accumulator Co.*, 40 Ch. D. 141; and *Sydney and Wigpool Iron, &c. Co. v. Bird*, 31 Ch. D. 328, and 33 Ch. D. 85.

(q) See cases in last note and the remarks of Rigby, L. J., in *Ex parte Stark* [1897], 1 Ch., p. 598, and his doubts in *Shaw v. Holland* [1900],

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Companies Act,
1900, § 8.

The Companies Act, 1900 (§ 8), leaves the payment of brokerage on the same footing as before (*r*), but expressly allows the payment of a commission to any person for subscribing or procuring subscriptions for its shares in certain cases and under certain restrictions, viz., only when its shares are offered to the public for subscription, and then only if the payment of the commission and its amount or rate per cent. are authorised by the articles of association *and* disclosed in the prospectus, and the commission paid does not exceed that amount or rate (*s*). Except in these cases and to this extent the Act forbids any company to apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person for subscribing or procuring subscriptions for its shares, whether the shares or money be applied by being added to the purchase money of any property acquired by the company, or to the contract price of any work to be executed by it, or the money be paid out of the nominal purchase or contract price or otherwise (*t*). Any transaction which gives a person a profit in consideration of his subscribing or procuring subscriptions for the company's shares, and involves an application of any of the company's shares for the purpose is within this section, *e.g.*, an agreement by the company giving an underwriter an option to take shares at a fixed price in consideration of his subscribing for its shares, is within the section, though the price fixed is more than the nominal value of the shares (*u*).

Prospectuses.

Turning now to the provisions of the Act which relate to prospectuses, it is to be observed that the Act applies to prospectuses which offer debentures and debenture stock, as well as to those which offer shares, to the public for subscription

2 Ch., p. 310; and compare *Ex parte Audain*, 42 Ch. D. 1. See p. xii. of the Report referred to *ante*, p. 40 note (*k*).

(*r*) § 8 (3).

(*s*) § 8 (1) and *Burrows v. Matabele Gold Reefs, &c. Co.* [1901], 2 Ch. 23.

(*t*) § 8 (2). This prohibition ex-

tends to all companies governed by the Act.

(*u*) *Burrows v. Matabele Gold Reefs, &c. Co.* [1901], 2 Ch. 23, and *Dexter v. United Gold Coast Mining Properties, W. N.* [1901] 152; affirmed *ib. p.* 157, where the option was to take shares at par.

or purchase; any notice, circular, advertisement, or invitation which makes such an offer to the public is a prospectus within the meaning of the Act (*x*). The three sections which contain the provisions now under consideration are §§ 2, 9, and 10.

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The first of these sections (§ 2) does not apply to a company registered before the commencement of the Act, nor to a company which does not issue any invitation to the public to subscribe for its shares, nor does it apply to any prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business (*y*). If the company does issue an invitation to the public to subscribe for shares it is apprehended that this section applies to a prospectus inviting the public to subscribe for debentures as well as to one which invites subscription for shares. The section appears to be limited to prospectuses issued by or on behalf of a company in existence at the time of the issue (*z*).

As to persons
named as
directors in a
prospectus. § 2.

No person may be named in any prospectus to which this section applies as a director (*a*) or proposed director of the company unless before the publication of the prospectus he has, by himself or by his agent authorised in writing, signed or filed with the registrar of joint stock companies a consent in writing to act as such director, and also either signed the memorandum of association for a number of shares not less than the number (if any) required to qualify him to be a director (*b*), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) (*c*).

Section 9 applies to every prospectus issued either by or on behalf of a company registered under the Companies Acts (whether formed before or after the Act of 1900 came into

Dating, signing,
and filing of
prospectuses.
§ 9.

(*x*) Companies Act, 1900, § 30.

(*y*) § 2 (3). And see as to this date § 6.

(*z*) Compare the words of this section with § 9 (1), § 10 (4), and the definition of the word "company" in § 30.

(*a*) Any person is a director within the meaning of the Act

who occupies the position of a director by whatever name he is called. See § 30.

(*b*) The Companies Acts do not require a director to hold any shares in the company.

(*c*) § 2 (1), and forms No. 42 and 43 in the order of the Board of Trade dated 28th Dec., 1900.

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operation (d)), or in relation to an intended company. Every prospectus within this section must be dated and filed for registration in accordance with the provisions of the Act before it is issued; and must state on the face of it that it has been so filed; unless the contrary be proved, the date on the prospectus is to be taken as the date of its publication. A copy of the prospectus must be signed by every person who is named in it as a director or proposed director of the company, or by his agent authorised in writing, and must be filed with the registrar of joint stock companies on or before the date of its publication. The registrar is not to register any prospectus until it has been so filed (e).

Contents of
prospectus. § 10.

Application of
§ 10.

The particulars which the Act requires to be stated in a prospectus are enumerated in § 10. This section does not apply to a circular or notice inviting existing members or debenture holders (f) to subscribe for further shares or debentures (g); on the other hand, the provisions in this section apply to prospectuses issued by or on behalf of any person who is or has been engaged or interested in the formation of the company, as well as to those issued by or on behalf of the company. This section, therefore, will include a prospectus issued by a promoter inviting the public to purchase his own shares or debentures, though such a prospectus would not, it is apprehended, be included in § 2 or § 9 (h). The section, speaking generally, applies to all such prospectuses whether they are issued before or after the formation of the company (i), though, as will be seen hereafter, the requirements of the section are somewhat modified in the case of prospectuses published more than one year after the

(d) See §§ 30 and 31.

(e) *Ib.*, § 9.

(f) § 10 (4) *Qu.*: Whether the exception was necessary for *semble* such a circular does not offer any shares or debentures to the public. See definition of prospectus, § 30, and *Burrows v. Matabele Gold Reefs, &c. Co.* [1901], 2 Ch., p. 27. If such a circular is a prospectus, a similar circular inviting existing members and debenture holders to

purchase, as distinguished from to subscribe for, further shares or debentures would be within the section.

(g) "Debenture" includes debenture stock. See § 30.

(h) See § 9. *Qu.*: Unless, being issued before the company was registered, it was held to be within the words "in relation to any intended company" in § 9.

(i) § 10 (4).

company is entitled to commence business, and in the case of prospectuses published as newspaper advertisements. Putting aside for the moment these two particular classes of prospectuses, every prospectus to which the section applies must contain the following particulars in addition to the date and the statement that it has been filed with the registrar of joint stock companies which are required in certain cases by § 9.

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Contents of
prospectus.

As to the memorandum of association :—

- (1) The contents (*k*).
- (2) The names, descriptions and addresses of each signatory.
- (3) The number of shares subscribed for by each signatory (*l*).

As to the directors (*m*).

- (4) The names, descriptions, and addresses of every director or proposed director (*n*).
- (5) The number of shares (if any) fixed by the articles of association as the qualification of a director (*o*).
- (6) Any provision in the articles of association as to the remuneration of the directors (*p*).
- (7) Full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property to be acquired by the company (*q*) with
- (8) A statement of all sums paid or agreed to be paid to any director in cash or shares by any person either to qualify him as a director or for services rendered by him in connection with the formation of the company (*r*).

(*k*) *Seem* this means all that precedes the words expressing the desire of the signatories to be formed into a company. The particulars (2) and (3) all form part of the memorandum of association. See Companies Act, 1862, sched. (II.), forms A. B. C. and D. The capital does not appear in the memorandum of an unlimited company. See form D.

(*l*) § 10 (1) (*a*).

(*m*) See also § 2, *ante*, p. 45. Any person occupying the position of a director is a director within the Act by whatever name he is called (§ 30).

(*n*) § 10 (1) (*c*).

(*o*) § 10 (1) (*b*).

(*p*) § 10 (1) (*b*).

(*q*) § 10 (1) (*m*).

(*r*) § 10 (1) (*m*).

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As to the company's shares.

- (9) The number of founders' or management shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company (*s*).
- (10) The number and amount of shares issued or agreed to be issued as fully or partly paid up otherwise than in cash, and
 - if as partly paid up, the extent to which they are so paid, and
 - in either case the consideration for which such shares have been or are proposed or intended to be issued (*t*).

As to the company's debentures.

- (11) Particulars similar to those in clause (10) *supra* (*u*).

As to allotment of shares (*x*).

- (12) The minimum subscription on which the directors may proceed to allotment (*y*).
 - (13) The amount payable on application (*z*) and allotment.
- And, in addition to the above, in the case of a second or subsequent offer of shares (*a*).
- (14) The amount offered for subscription on each previous allotment.
 - (15) The amount actually allotted (*qu*. on each previous allotment).
 - (16) The amount (if any) paid on shares previously allotted.

As to the vendors (*b*) and purchase money.

- (17) The names and addresses of the vendors of any property purchased or acquired by the company or proposed so to be

(*s*) § 10 (1) (*a*).

(*t*) § 10 (1) (*e*). See, too, the particulars in this report, which have to be included in the returns of allotment (§ 7).

(*u*) § 10 (1) (*e*).

(*x*) § 10 (1) (*d*).

(*y*) See as to this § 4 (1) and *supra*, p. 41.

(*z*) This may not be less than 5 per cent. on the nominal amount of the share. See § 4 (3).

(*a*) The words "offer of shares" seem to imply that these particulars are not required in a prospectus which relates only to debentures.

(*b*) As to who is a vendor, see § 10 (2), *infra*, p. 50.

- (a) which is to be paid for wholly or partly out of the proceeds of the issue which is offered for subscription by the prospectus, or

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- (b) the purchase or acquisition of which has not been completed at the date of the publication of the prospectus (c).

- (18) The amount payable in cash, shares or debentures to the vendor, and when there is more than one separate vendor or the company is a sub-purchaser the amount so payable to each vendor (c).

- (19) The amount (if any) paid or payable as purchase money in cash, shares or debentures for any such property specifying the amount payable for goodwill (d).

As to commission for subscribing or placing shares, preliminary expenses and promotion money—

- (20) The amount or rate (if any) paid or payable as commission for subscribing or procuring subscription for any shares of the company or for agreeing so to do (e).

- (21) The amount or estimated amount of preliminary expenses (f).

- (22) The amount paid or intended to be paid to any promoter and the consideration for any such payment (g).

As to contracts (h)—

- (23) The dates of and parties to every material contract.

- (24) A reasonable time and place at which any material contract or a copy may be inspected.

Provided that no mention need be made of—

- (a) Contracts entered into in the ordinary course of the business carried on or to be carried on by the company.

(c) § 10 (1) (c).

(f) § 10 (1) (i).

(d) § 10 (1) (g).

(g) § 10 (1) (j). See, too, § 11 as

(e) § 10 (1) (h). No commission may be paid unless it be mentioned in the prospectus; see § 8, *supra*, p. 43.

to varying these contracts.

(h) § 10 (1) (k). Compare the repealed § 38 of the Companies Act, 1867, noticed *infra*, pp. 128 *et seq.*

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Sect. 4.

(b) Contracts entered into more than three years before the date of the publication of the prospectus.

As to auditors—

(25) The names and addresses of the auditors (if any) of the company (i).

In the case of a prospectus published more than one year after the date on which the company is entitled to commence business (k).

The particulars specified in paragraphs (1) (2) (3) (4) (5) (6) (7) (8) and (21) (l) may be omitted, and

The obligation to disclose material contracts is limited to the period of two instead of three years next preceding the publication of the prospectus (m).

In the case of a prospectus published as a newspaper advertisement—

The particulars specified in paragraphs (1) (2) and (3), *supra*, may be omitted (n).

What vendors
are within § 10.

It is to be observed that the description vendor in § 10 is not limited to the person from whom the company immediately purchases. If this were so one of the main objects of the section, which is to get at the real as distinguished from the nominal vendor (o), would be frustrated. The word includes (p) every person who has entered into a contract absolute or conditional for the sale or purchase, or for any option of purchase, of any property to be acquired by the company in any case where 1st, the purchase money is not fully paid at the date of the publication of the prospectus (q); or 2ndly, the purchase money is to be paid or satisfied wholly or in part out of the

(i) As to audit, see §§ 21-23.

(k) As to when a company is entitled to commence business see § 6.

(l) § 10 (4) (a). This seems to be the effect of the sub-section, but its meaning is not very clear; see the section. The particulars in (9) *supra*, are not necessarily in the memorandum of association; but compare § 10 (6) with § 10 (4) (a).

(m) § 10 (4) (b).

(n) § 10 (6).

(o) See p. xi. of the Report referred to, *supra*, p. 40, note (k).

(p) § 10 (2). Where the property to be acquired is to be taken on a lease "vendor" includes lessor, "purchase money" the consideration for the lease, and "sub-purchaser" a sub-lessee. § 10 (3).

(q) If the property to be acquired is a going concern, and the vendor has agreed to purchase, *e.g.*, articles

proceeds of the issue offered for subscription by the prospectus; or 3rdly, the contract depends for its validity or fulfilment on the result of such issue. With reference to the third of these classes of cases it is to be observed that every contract entered into with a company is provisional until the company is entitled to commence business, and its right to commence business depends partly on the minimum subscription being obtained (s). It would therefore seem that whenever a prospectus offers shares to the public for subscription every contract between a vendor and a company comes within the third class unless the company was entitled before the prospectus was issued to commence business, or unless, as might conceivably happen, the condition as to the minimum subscription had been fulfilled, though the other conditions necessary to entitle the company to commence business had not been fulfilled.

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Sect. 4.

No contract mentioned in a prospectus may be varied prior to the first statutory meeting, except subject to the approval of that meeting (t).

Variation of
contracts.

The Act does not state the consequences of issuing a prospectus which does not comply with its requirements, but § 10 does provide that any condition binding an applicant to waive compliance with its requirements is void (u). This question will be discussed hereafter in connection with fraudulent prospectuses. (*Infra*, pp. 124 *et seq.*)

Consequences of
non-compliance
with the Act.

Any company registered under the Companies Acts and formed for the purpose of making or working a railway in India which has power to pay interest out of capital on its paid-up share capital during the construction of the railway must give notice to this effect in every prospectus inviting subscription for shares (x).

Indian railway
companies.

of stock-in-trade in the ordinary course of business, *qu.* if the seller of such articles is a vendor as to whom the particulars mentioned in § 10 (1) (f) (par. (17) and (18), *supra*) need be stated. See the proviso to § 19 (1) (k) (par. (24), *supra*).

(s) See § 6 (1) (a) and (3).

(t) § 11. As to the difficulty raised by this reference to the statutory meeting, see *supra*, p. 42.

(u) § 10 (5).

(x) Indian Railways Act, 1894, § 5. This Act expires in 1905; see § 9.

CHAPTER II.

OF MEMBERSHIP.

SECTION I.—WHO CAN BE MEMBERS.

Bk. I. Chap. 2.
Sect. 1.

EVERY person who is capable of contracting is capable of becoming a member of a company (a). A company may no doubt be formed on terms which expressly exclude certain persons or classes of persons from becoming members of it ; but regulations to this effect do not affect the legal capacity of the persons excluded. Such capacity depends on the general law of the country, not on the regulations of any particular company. But notwithstanding the general proposition above stated, a few observations are necessary with reference to 1. Aliens ; 2. Convicts ; 3. Infants ; 4. Lunatics ; 5. Married women ; and 6. Corporations and companies.

1. *Aliens.*

Alien friends.

There is nothing to prevent an alien, not an enemy, from holding shares in a company (b). But a public minister of a foreign state, accredited to and received by the Queen, cannot, even though he be a British subject, be sued here even in respect of commercial transactions in which he may have engaged ; this privilege, however, may be excluded by an express condition to the contrary made at the time the minister is received (c). If, therefore, such a person holds a share in a company, he cannot, while so accredited and

(a) Partn. 79 ; as to the clergy, see 1 & 2 Vict. c. 106, §§ 29-31, and 4 Vict. c. 14.

(b) A ship may be registered in the name of a company, although some of its members are foreigners.

R. v. Arnaud, 9 Q. B. 806 ; and 17 & 18 Vict. c. 104, § 18. See, generally, as to aliens, 33 Vict. c. 14.

(c) *Macartney v. Garbutt*, 24 Q. B. D. 368.

received, be sued here, either for calls or in respect of the debts and liabilities of the company (*d*), unless this privilege was excluded at the time of his reception. Bk. I. Chap. 2.
Sect. 1.

Alien enemies stand in a very different position from alien friends. For when two supreme powers are at war all persons who for the time being are the subjects of either, become, in contemplation of the civil tribunals of both, hostile to the subjects of the other; and so long as the war lasts, the subjects for the time being of the one country are incapable of entering into any valid contract with the subjects of the other; and all remedies available for the one against the other in respect of transactions before the war are suspended (*e*). Consequently while war lasts an agreement by an alien enemy to become a member of an English company cannot be enforced. The effect of a person who is a member of a company becoming an alien enemy by a declaration of war has never been decided; but *Ex parte Boussmaker* (*f*) tends to show that such a person would not *ipso facto* cease to be a member: but rather that his rights and liabilities would be suspended during the war, and might be enforced upon the restoration of peace (*g*). Alien enemies.

It is to be remembered that whether a person is or is not to be considered as an enemy depends, not on whether there is war between this country and his native land, but upon whether there is war between this country and the country in which he is voluntarily resident (*h*). A foreigner resident in this country and holding shares in an English company would not therefore be affected as regards his shares by a war between this country and his own (*i*).

(*d*) *Magdalena Steam Nav. Co. v. Martin*, 2 E. & E. 94.

(*e*) *Albrecht v. Sussman*, 2 Ves. & B. 323; *Willison v. Patteson*, 7 Taunt. 440; *Ex parte Boussmaker*, 13 Ves. 71; *Potts v. Bell*, 8 T. R. 548. See the note to *Clemontson v. Blessig*, 11 Ex. 141.

(*f*) 13 Ves. 71.

(*g*) Subject to being barred by the Statute of Limitations. Whether

peace operates retrospectively, see *New York Life Ins. Co. v. Statham*, 3 Otto, 24 (Amer.).

(*h*) *Albrecht v. Sussman*, 2 Ves. & B. 323; *Willison v. Patteson*, 7 Taunt. 440; *Houriet v. Morris*, 3 Camp. 303; *Bell v. Reid*, 1 M. & S. 726.

(*i*) See *Wells v. Williams*, 1 L. Raym. 282; 1 Salk. 46; and the cases in the last note.

Bk. I. Chap. 2.
Sect. 1.

Residence of
company.

With reference to the legality of trade and commerce, a company ought, it is conceived, to be treated as resident not only where its principal place of business is, but wherever it has any place of business (*k*). It has, however, been determined, that for the purpose of deciding whether a company dwells within a particular district, regard ought to be had rather to the place where its business is principally carried on than to the situation of its subordinate offices (*l*).

A registered company does not necessarily dwell where its registered office is situate (*m*).

A note on the subject of foreign companies will be found in the Appendix.

2. *Convicts.*

The old law by which the property of felons was forfeited to the Crown was abolished by 33 & 34 Vict. c. 23 (*n*). The Crown, however, is empowered to commit the custody and management of the property of any convict (*i.e.*, a person sentenced to death or penal servitude) (§ 6) to an administrator (§ 9) in whom all the convict's property then becomes vested (§ 10), and who can dispose of the same as he may think fit (§ 12). A convict cannot alienate any of his property nor make any contracts, nor maintain any action for the recovery of any property, debt, or damage (§ 8), except when lawfully at large under a proper license (§ 30). Provision is also made for the appointment by a justice of the peace of an interim curator of a convict's property (§ 21).

Position of the
administrator.

There have not as yet been any decisions on the application of this Act to convict shareholders. But several important questions are suggested by it: *e.g.*, Is the administrator, himself a shareholder, liable to pay calls and to be a contributory

(*k*) See *Carron Co. v. Maclaren*, 5 H. L. C. 416, and *Lewis v. Baldwin*, 11 Beav. 153, from which it appears that for some purposes at all events companies may be considered as resident in more places than one.

(*l*) See *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421; *Brown v. Lond. and N. W. Rail. Co.*, 4 B. & Sm. 326; *Shield v. Great N.*

Rail. Co., 7 Jur. N. S. 632; *Adams v. Great W. Rail. Co.*, 6 H. & N. 404; *Taylor v. Crowland Gas Co.*, 11 Ex. 1.

(*m*) *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428; *Calcutta Jute Mills Co. v. Nicholson*, *ib.*; *Keynsham Blue Lias Co. v. Barker*, 2 H. & C. 729.

(*n*) Partn. 81.

in the event of the company being wound up? or is he entitled to sell and transfer the convict's shares without becoming a shareholder himself? Sect. 10 is so worded that it may possibly be held to make the administrator a shareholder simply by virtue of his office; but when the section is applied to the shares of any particular company, the company's Act, charter, or regulations may enable the administrator to dispose of the shares vested in him without himself becoming a shareholder, and incurring personal liability as such (see also § 12).

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Sect. 1.

3. *Infants.*

An infant may be a member of a company, but he can repudiate his shares whilst he is an infant or on coming of age (o). If he does repudiate his shares and has derived no advantage from them, he may recover what he paid for them (p).

An infant, however, cannot hold shares and decline to pay the calls in respect of them. He may, if he chooses, repudiate his shares and so get rid of his liabilities (q); but if he does not repudiate the shares, he must pay calls like any other shareholder (r). *Qui sentit commodum sentire debet et onus.*

If a company's memorandum of association is signed by an infant, his signature is by no means inoperative. Even before the Companies Act, 1900, was passed, which has made the certificate of incorporation conclusive (s), the incorporation of

(o) Co. Lit. 380b; *Dublin and* Bing. 252.

Wicklow Rail. Co. v. Black, 8 Ex. 181; and see *Mitchell's case*, 9 Eq. 363; and *Ebbett's case*, 5 Ch. 302, and others of that class. If a company is being wound up and is insolvent, of course it will be for the benefit of an infant shareholder to repudiate his shares, and so avoid being made a contributory. See *Reid's case*, 24 Beav. 318; and *infra*, Bk. IV., under the head Contributories.

(p) *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* [1894], 3 Ch. 589; *Corpe v. Overton*, 10

(q) *Lond. and N. W. Rail. Co. v. McMichael*, 5 Ex. 114; *Newry and Enniskillen Rail. Co. v. Coombe*, 3 Ex. 565, and the cases referred to in Bk. IV., under the head Contributories.

(r) See *Cork and Brandon Rail. Co. v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Rail. Co. v. Fearnley*, 4 Ex. 26; *North West Rail. Co. v. McMichael*, 5 Ex. 114. *The Birkenhead, Lancashire, &c. Rail. Co. v. Pilcher*, 5 Ex. 24, is not opposed to these; see *S. C.* ib. 121.

(s) 63 & 64 Vict. c. 48, § 1.

Bk. I. Chap. 2. the company was not affected by it: and he becomes a member
Sect. 1. — until he repudiates his share (*t*).

An infant who has had shares in a company transferred to him, may be rejected as a shareholder by the company on ascertaining the fact of his infancy (*u*); but the transfer is voidable only and not void, and unless repudiated by the company or the infant will be held good (*x*).

An infant may be a member of a building society under the Building Societies Act, 1874, unless prohibited by the rules (*y*), and although he is not competent to vote or hold office (*y*), he can give his consent to an instrument of dissolution (*z*). If an advance has been made to him by the society to enable him to purchase property and he has mortgaged the property to the society to secure the advance, he cannot on coming of age retain the property and repudiate the mortgage upon it (*a*).

An infant may also be a member of a registered industrial and provident society unless prohibited by the rules (*b*).

The Infants' Relief Act, 1874 (*c*), which renders invalid promises made by persons of age to pay debts contracted during their minority, does not apparently affect the position of persons who become shareholders before they are twenty-one, and retain their shares after they come of age.

The position of infant shareholders on the winding up of companies will be alluded to hereafter when treating of contributories.

4. Lunatics.

Although contracts with lunatics are not necessarily void, and lunatics not known so to be (*d*) may become liable in

(*t*) See *In re Laxon & Co.* (2) *Building Society* [1901], 1 Ch. 88. [1892], 3 Ch. 555, and *Nassau Phosphate Co.*, 2 Ch. D. 610. Qu.: if the mortgage is valid.

(*u*) See *Symon's case*, 5 Ch. 298, too, § 25. (*b*) 56 & 57 Vict. c. 39, § 32; see,

and *infra*, in Bk. IV.

(*x*) *Lumsden's case*, 4 Ch. 31.

(*y*) 37 & 38 Vict. c. 42, § 38.

(*z*) *Dennison v. Jeffs* [1896], 1 Ch. 611. As to friendly societies, see *Rudd v. James* [1896], 2 Ch. 554.

(*a*) *Thurston v. Nottingham, &c.*

(*c*) 37 & 38 Vict. c. 62. (*d*) If a person sets up the defence of insanity to an action on contract he must aver and prove that the plaintiff knew he was insane. *Imperial Loan Co. v. Stone* [1892], 1 Q. B. 599.

damages for breach of contract (e), yet a lunatic cannot be compelled specifically to perform a contract, nor can he obtain a judgment for specific performance against other people (f). But a lunatic may become a shareholder without his insanity being known; and if he does he cannot repudiate his shares (g); whence it follows that he is entitled to dividends, and is liable to calls in respect of them.

A lunatic who is so found by inquisition, and whose property is under the care of a duly appointed committee, is not in a position to bind himself by contracts or to deal with his own property. Shares belonging to him remain his, and he is liable to calls and to be a contributory in respect of them; but his rights in respect of them can only be exercised by his committee.

By the Lunacy Act, 1890 (53 Vict. c. 5) (h), the committee can, by direction of the Judge in Lunacy (i), sell and transfer them without himself becoming a member in respect of them; and this power is usually exercised if the holder of them is under any liability to have calls made upon him.

By the same Act (j), shares standing in the name of a lunatic trustee may be transferred by a person appointed by the Judge in Lunacy for the purpose.

5. Married women.

As regards married women, it is necessary in the first place to distinguish those who have separate estate from those who have none.

(e) See case in last note, and *Drew v. Nunn*, 4 Q. B. D. 661; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170. As to lunatics so found, see *Snook v. Watts*, 11 Beav. 107.

(f) See Fry on Spec. Perf.

(g) See *Moulton v. Camroux*, 2 Ex. 487, and 4 ib. 17; *Beavan v. McDonnell*, 9 ib. 309, and 10 ib. 184.

(h) See §§ 116, 117, 120, 124, and 341. For the old law see the repealed Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), §§ 2, 116,

120, 123, 140-144.

(i) Ib. § 108, and the Lunacy Act, 1891 (54 & 55 Vict. c. 65), § 27, and rules in Lunacy, 1892 (amended by rule of Nov. 1, 1900), rr. 17-19.

(j) § 136, which replaced § 5 of the Trustee Act, 1850 (13 & 14 Vict. c. 60). For form of order see *In re C. M. G.* [1898], 2 Ch. 324; *In re Gregson* [1893], 3 Ch. 233; and *In re New Zealand Trust & Loan Co.* [1893], 1 Ch. 403. Similar orders may be made in certain other cases. See §§ 133, 134.

Bk. I. Chap. 2.
Sect. 1.
— — — — —
No separate
estate.

Until recently a married woman without separate estate could not, except in a few cases (*k*), contract as a principal, but since the Married Woman's Property Act, 1893 (*l*), came into operation, she has power to contract even if she has no separate estate, so as to bind any separate estate she may subsequently acquire. So long as she has no separate estate it is conceived that she cannot be compelled to take shares which she may have applied for; nor can she be compelled to pay for them; nor is she liable to pay any calls in respect of any shares which may have been in fact allotted to her and are standing in her name. If, however, she subsequently acquires separate estate which she is not restrained from anticipating, it is conceived that to the extent of such estate she will be liable to pay for any shares she may have agreed to purchase, and to pay calls on shares allotted to her and standing in her name, whether such calls were made before or after she acquired her separate estate. Whether her husband is a shareholder or is liable to calls in respect of shares standing in the name of his wife depends on the nature of the company. But if, as often happens, he cannot be regarded as a member of the company consistently with its regulations or with the statutes by which it is governed, he will not be liable in respect of them (*m*).

Separate estate.

A married woman having separate estate which she is not restrained from anticipating is, as to such estate, in the position of a *feme sole* (*n*). She can invest it in shares, and make herself liable to pay for them and to pay calls upon them to the extent of such separate estate (*o*); and on the winding up of the company she will be a contributory in respect of her

(*k*) Viz., 1, When her husband is a convicted felon; 2, when he is judicially separated from her; 3, when she has obtained a protection order against him; 4, when he is an alien enemy abroad; 5, when the wife is trader in the city of London. See Partn. 85.

(*l*) 56 & 57 Vict. c. 64, § 1.

(*m*) See as to his non-liability to be made a contributory, *Angus'*

case, 1 De G. & Sm. 560; *Ex parte Rhodes*, 7 W. R. 510. Compare *Luard's case*, 1 De G. F. & J. 533; and as to his non-liability to *sci. fa.*, *Ness v. Angus*, 3 Ex. 805; *Dodgson v. Bell*, 5 ib. 967.

(*n*) 45 & 46 Vict. c. 75, § 1, and 56 & 57 Vict. c. 64, § 1.

(*o*) *Ib.*

shares to the like extent (*p*). Her husband is not liable in respect of such shares (*q*). Bk. I. Chap. 2.
Sect. 1.

A married woman entitled to fully paid up shares for her separate use can compel the company to register them in her name (*r*); but she cannot do so if the holding of the shares involves liability, and there is anything in the company's Act or regulations which entitles the company to decline to accept her as a shareholder (*s*).

By the Married Woman's Property Act, 1882, shares standing in the sole name of a married woman are deemed to belong to her for her separate use unless the contrary be proved (*t*).

If a *feme sole* is a shareholder and marries, the law now is that the shares are her separate estate and, subject to a qualification, to be mentioned presently, she is alone liable in respect of them (*u*). Formerly, both she and her husband were liable (*x*); and even now he is liable to calls made on his wife's shares, whether before or after the marriage, if he has in fact obtained by the marriage property of his wife to the value of such calls (*y*). A judgment recovered against the wife is no defence to an action against the husband (*z*). Further, in the event of the company being wound up and his wife becoming a contributory, he is liable to be put on the list himself (*a*). His liability as a contributory to calls is confined to the continuance of the marriage (*b*), but not to the amount of the property acquired from his wife (*c*). Feme sole shareholder marrying.

The Married Woman's Property Act, 1882, § 17, enables the husband or the wife or the company to obtain a decision

(*p*) 45 & 46 Vict. c. 75, §§ 6 & 7; and see *Matthewman's case*, 3 Eq. 781; *Lond. and Bombay Bank*, 18 Ch. D. 531.

(*q*) See 45 & 46 Vict. c. 75, §§ 1, 6, 7; as to shares standing in her name before marriage, see *infra*; *Luard's case*, 1 De G. F. & J. 533, seems no longer law except as regards such shares.

(*r*) *Ib.*, §§ 6, 7; *R. v. Carnatic Rail. Co.*, L. R. 8 Q. B. 299.

(*s*) *Ib.*, § 7.

(*t*) *Ib.*, §§ 6 & 7.

(*u*) *Ib.*, §§ 6 & 13.

(*x*) See *Luard's case*, 1 De G. F. & J. 533; *Burlinson's case*, 3 De G. & Sm. 18; *Sadler's case*, *ib.* 36; *Khlut's case*, *ib.* 210; *White's case*, *ib.* 157; *Ex parte Hatcher*, 12 Ch. D. 284.

(*y*) 45 & 46 Vict. c. 75, § 14.

(*z*) *Beck v. Pierce*, 23 Q. B. D. 316.

(*a*) Companies Act, 1862, § 78; *Ex parte Hatcher*, 12 Ch. D. 284; see also *Bell's case*, 4 App. Cas. 550.

(*b*) See the section.

(*c*) See *Ex parte Hatcher*, 12 Ch. D. 284; decided on the Married Woman's Property Act, 1874.

Bk. I. Chap. 2. as to his or her title to shares, by summons or otherwise, in a
Sect. 1. summary way, before a judge of the High Court (*d*).

Date of marriage. It is necessary to mention that the date of marriage is sometimes material; but on this point it is sufficient to refer the reader to the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75).

6. Corporations and Companies.

Corporations,
&c., may be
partners.

There is no general principle of law which prevents a corporation from holding shares in a company except the principle that a corporation cannot lawfully employ its funds for purposes not authorised by its constitution. It has been assumed by the legislature, in many of the statutes relating to companies, that corporations may lawfully be shareholders (*e*), and at common law one corporation may be a member of another (*f*). Accordingly it has been held that where the above principle does not apply one company may hold shares in another (*g*). Practically, however, it may be said to be *prima facie ultra vires* for one company to hold shares in another: *i.e.*, power so to do must be shown to be expressly or impliedly given to it (*h*).

By the common law if shares were held in the joint names of a corporation and an individual, the corporation and the individual were tenants in common of the shares, and not joint tenants, for there was no right of survivorship between them (*i*); but the law in this respect has recently been altered by statute (*ii*).

(*d*) See the section.

(*e*) See, for example, the Companies Act, 1862, §23, and the interpretation put on it in the cases cited in note (*g*); the Industrial and Prov. Soc. Act, 1893 (56 & 57 Vict. c. 39), § 38.

(*f*) Grant on Corporations, p. 5.

(*g*) *Ex parte Contract Corp.*, 3 Ch. 105; *Royal Bank of India's case*, 4 Ch. 252, and 7 Eq. 91. As to whether a company can be a member of a building society see *Dobinson v. Hawks*, 16 Sim. 407, a decision relating to an unincorporated society. An industrial society registered under 56 & 57 Vict. c. 39 may be a member of a

building society. See § 38. A corporation cannot be treasurer of a friendly Society. *Ex parte Swansea Friendly Society*, 11 Ch. D. 768.

(*h*) See *Great W. Rail. Co. v. Metrop. Rail. Co.*, 9 Jur. N. S. 562; *Ex parte Contract Corp.*, 3 Ch. 105; *Ex parte British Nation, &c.*, 118, 8 Ch. D. 679, where it was held that a society to which shares in another society had been transferred by an act *ultra vires*, could not be placed on the list of contributories of that society.

(*i*) *Law Guarantee & Trust Society v. Governor, &c. of the Bank of England*, 24 Q. B. D. 406.

(*ii*) Bodies Corporate (Joint

SECTION II.—WHAT CONSTITUTES MEMBERSHIP.

Bk. I. Chap. 2.
Sect. 2.

Generally speaking, some condition has to be performed, some formality to be observed, before a person entitled to become a member actually becomes one, and before a person entitled to retire actually ceases to be a member. What these conditions or formalities are in any particular case can only be ascertained by examining the Act of Parliament, charter, deed or other instrument by which the company is governed; and care therefore must be taken in applying decided cases to attend to the constitutions of the companies to which they relate (j).

Who are members of companies.

No person can, properly speaking, be said to be a member of or shareholder in a company so long as he has only a right to become such: nor can a person who has become a member or a shareholder be properly said to have ceased to be one so long as he has only a right to retire.

Necessity of observing formalities.

If a person who is not a shareholder omits to do what is necessary to render himself a shareholder, he remains a non-shareholder, although very little may be wanting to render him a shareholder. On the other hand, if a person who is a shareholder already omits to do what is necessary to retire, he continues to be a shareholder whatever intention he may have had of withdrawing from the company, and whatever preliminary steps he may have taken for that purpose. In these cases that which is necessary to change an existing state of things has not happened: the right to enter or leave the company has not been exercised; and until such right has been exercised membership in the proper sense of the word has not been created in the one case, and has not ceased in the other. Subject then to the qualifications to be mentioned presently, before a person entitled to become a member actually becomes one, all necessary conditions must be fulfilled.

Tenancy) Act, 1899 (62 & 63 Vict. c. 20), and as to stock transferable at the Bank of England, see 55 & 56 Vict. c. 39, § 6.

(j) As to the construction of Acts of Parliament, apparently making payment by an allottee (or some

qualification) a condition precedent to his becoming a shareholder, see *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15; *McEuen v. West Lond. Wharves, &c. Co.*, 6 Ch. 655, and *Portul v. Emmens*, 1 C. P. D. 201 & 664.

Bk. I. Chap. 2.
Sect. 2.

There are many cases in the books illustrating this principle, and to which it may be convenient shortly to refer.

7 & 8 Vict.
c. 110.

The repealed Act 7 & 8 Vict. c. 110, defined a shareholder to mean any person entitled to a share, *and* who had executed the deed of settlement, or a deed referring to it (*k*); and it was held that no person was a shareholder within the meaning of the Act if he had not signed the deed, although he might be entitled to shares and be registered and returned as a shareholder (*l*).

Non-execution
of deed.

Other cases, in which the non-execution of the company's deed has been held to prevent a person entitled to shares in a company from being a shareholder therein, will be found in the note below (*m*).

19 & 20 Vict.
c. 47.

Again, by the repealed Joint-stock Companies Act, 1856, it was declared that every person who had accepted shares in a registered company, and whose name was entered in the register, and no other person (except a subscriber to the memorandum of association in respect of the shares thereby subscribed for by him), should for the purposes of the Act in question be deemed to be a shareholder (*n*); and in the articles which, in the absence of other regulations applied to companies registered under the Act, it was declared that no person should be deemed to have accepted any share unless he had testified his acceptance thereof, by writing under his hand in such form as the company from time to time should direct (*o*). Under these provisions it was held that a person who merely agreed to take shares, but did not testify his acceptance of them in the particular form required, did not

(*k*) See 7 & 8 Vict. c. 110, § 3; this definition did not apply to mutual insurance societies; see the section.

(*l*) *Baily v. Universal Prov. Life Assoc.*, 1 C. B. N. S. 557; *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Same*, *ib.* 736. The registrar's certificate that a person had been returned as a shareholder was *prima facie* evidence of his being so.

Turner v. Metropolitan Live Stock Co., 2 Ex. 567.

(*m*) *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598; *Curmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282; *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Waterford, &c. Rail. Co. v. Pidcock*, 8 Ex. 279.

(*n*) 19 & 20 Vict. c. 47, § 19.

(*o*) 19 & 20 Vict. c. 47, table B., § 1.

become a shareholder, although he was registered as such (p). Bk. I. Chap. 2.
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Upon precisely the same principle a purchaser of shares in a company is not a shareholder in it until he has made himself such by complying with its regulations as to the admission of members (q); and, on the other hand, a shareholder who has sold his shares remains a shareholder until the purchaser has taken his place (r). Purchasers of
shares.

Again, where shares are held by A., whether as trustee for B. or simply as his agent, and B. has done nothing to render himself a shareholder, according to the terms of the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, although A. may be insolvent (s). But as will be seen hereafter, a person cannot escape liability by assuming a fictitious name (t). Cestuis que
trustent.

A person who has entered into a binding agreement with a company to take shares in it, cannot complain if the company acts on the faith of the agreement, and complies for him with those formalities which he has bound himself to observe. Upon this principle, where a person has agreed with a company to take shares in it and nothing remains to make him a shareholder except to register him as such (u), and the company registers him accordingly, he becomes a member, Formalities
complied with
by the company.

(p) *New Brunswick, &c. Rail. Co. v. Muggerridge*, 4 H. & N. 160 and 580. Compare this case with *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, where no particular form of acceptance was required.

(q) *Hay v. Willoughby*, 10 Ha. 242.

(r) See, for example, *Mid. G. W. Rail. Co. v. Gordon*, 16 M. & W. 804.

(s) See *United Kingdom Mutual Steam Assurance Association v. Nevill*, 19 Q. B. D. 110; (compare with this case *British Marine Mutual Ins. Co. v. Jenkins* [1900], 1 Q. B. 299; *Montgomerie v. United Kingdom Mutual Steam Ass. Assoc.* [1891], 1 Q. B. 370; and *Great*

Britain, &c. Ins. Assoc. v. Wyllic, 22 Q. B. D. 710); *Barrett's case*, 4 De G. J. & Sm. 416; *Muir's case*, 4 App. Cas. 337; *Ex parte Buggy*, 2 Dr. & Sm. 452; *Newry Rail. Co. v. Moss*, 14 Beav. 64; *Jefferys v. Smith*, 3 Russ. 158; and other cases referred to hereafter in Bk. IV. c. 1, under the head Contributors. Compare *Godlard v. Hodges*, 1 Cr. & M. 33; and *Cox's case*, 4 De G. J. & Sm. 53.

(t) *Infra*, pp. 76, 77.

(u) This is essential. See *Waterford, Wexford, &c. Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282.

Bk. I. Chap. 2. although he may have protested against such registration (x).
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But it need hardly be observed that persons cannot be made members without their consent; and if a company or some other person has placed shares in a person's name, and complied with all the formalities necessary to make him a member, he will nevertheless not be a member, unless he has by agreement or otherwise authorised the acts in question, or ratified them, and thereby assented to take the shares (y).

Type of a
member.

The type then of a member or shareholder of a company is a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. Where all these circumstances are combined, there is membership in the fullest and most accurate sense. This, indeed, would be too obvious to require express statement were it not useful to have present to the mind a standard by which to judge of other cases. In practice difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from, and membership be nevertheless constituted.

Membership in
equity, though
not at law.

In the first place, a person bound by agreement with a company to take shares in it, can be compelled specifically to perform his agreement, and on this principle he can often be treated as a member in equity (z). There are endless cases in the books in which persons not shareholders in the strict and proper sense of the word, have nevertheless been held to be contributories on the winding up of the company (a). But the equitable maxim that what has been agreed to be done is to be treated as done, is only a consequence of the more general principles applicable to the specific performance of contracts; and the maxim only applies as between the parties to an agreement of which specific performance can be decreed and their

(x) *Midland Gt. West. Rail. Co. v. Gordon*, 16 M. & W. 804, and other cases of that class, noticed ante, p. 27, and post. See, also, *Leishman v. Cochrane*, 1 Moo. P. C. N. S. 315.

(y) See, for example, *Edwards v. Kilkenny Rail. Co.* 14 C. B. N. S.

526; *Fox's case*, 3 De G. J. & S. 465; *Higgs's case*, 2 Hem. & M. 657.

(z) The subject of specific performance so far as it relates to shares will be discussed hereafter.

(a) These cases will be noticed hereafter. *Yelland's case*, 5 De G. & Sm. 395, illustrates the principle.

representatives. If therefore a person has agreed, not with the company or its agents, but with some one else, to take shares in the company, and such person does not perform those conditions which are necessary to render him a member thereof, then whatever his position and obligations may be as between himself and the other party to the agreement, he will not be a member of the company in equity any more than at law (b).

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Secondly, the performance of conditions and observance of formalities may be dispensed with ; and irregular, as distinguished from void, transactions may be confirmed. Consequently, a person may become a shareholder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the statute, charter, or deed of settlement constituting the company, and although there may have been irregularities in the issue of the shares to him ; for if, notwithstanding these circumstances, he has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder. So, if a shareholder, having a right to retire, has in fact retired and been treated by the company as if he were no longer a shareholder, both he and the company will be estopped from denying that he has ceased to be a shareholder, although he may not have retired regularly and properly. This doctrine of estoppel by conduct has been frequently recognised (c), but its application is attended with difficulty, and involves the important question to what extent prescribed formalities and conditions can be disregarded by companies, *i.e.*, by the persons who conduct their affairs, and whose obvious duty it is to observe what is prescribed. Upon this question opinions have differed, and the non-compliance of prescribed formalities has frequently been held to be conclusive upon the question of membership or no membership, notwithstanding an apparent waiver of

Waiver of formalities.

Estoppel by conduct.

(b) See *Hay v. Willoughby*, 10 Ha. 242. See, also, *Humby's case*, 5 Jur. N. S. 215, and others of that class noticed hereafter under the head of Contributories.

(c) The leading authority on the subject of estoppel by conduct is *Carr v. Lond. and N. W. Rail. Co.*, L. R. 10 C. P. 307.

Bk. I. Chap. 2. those formalities by all parties. Moreover there are decisions
Sect. 2. which show that a person who, in an action for calls, is estopped from denying that he is a shareholder, may nevertheless show that he is not one when sued by a creditor of the company.

It becomes necessary, therefore, to subdivide the cases bearing upon the present subject-matter of inquiry, and to distinguish those in which the question of membership or non-membership arises between the company on the one part, and an alleged member on the other, from those in which the question arises between the alleged member on the one part, and the creditors of the company on the other.

First, as between the company and an alleged shareholder.

Effect of
waiver as be-
tween the com-
pany and the
shareholder.

Burnes v.
Pennell.

It has frequently been decided, even at law, that where a person has acquired a right to become a shareholder, and he has acted and been treated by the company as a shareholder, he is liable to calls at the suit of the company, although he may not have complied with all the formalities prescribed by the regulations of the company for the admission of members. Thus, in *Burnes v. Pennell (d)*, the deed of settlement of a company required certain acts to be performed by every purchaser of shares, before he could become entitled to exercise the rights of a shareholder. A purchaser of shares did not comply with the terms of the deed, but he nevertheless paid some calls made on his shares, and he was registered as a shareholder. It was held that he could not resist an action for further calls on the ground that he was not a shareholder.

Sheffield, &c.,
Rail. Co. v.
Woodcock.

Again, in a case where an Act of Parliament required that the shares in a company should be transferred by deed stating the consideration for the transfer, and a person purchased shares without taking a proper transfer, the transfer being in blank, with the consideration stated untruly, but he nevertheless signed a proxy paper describing himself as a shareholder, and transmitted it to the company, and was thereupon registered as a shareholder, it was held, that in an action for calls by the company he was estopped from denying the validity of the transfer (e).

(d) 2 H. L. C. 497.

Woodcock, 7 M. & W. 574. See,

(e) *Sheffield, &c., Rail. Co. v. too, Cheltenham Rail. Co. v. Daniel,*

So in *The Cheltenham and Great Western Union Railway Company v. Daniel* (f), an original subscriber to a projected railway company sold his scrip to the defendant. The company after its formation had notice of this sale from the defendant himself; he claimed to be registered in respect of the scrip which he had purchased, and he sent the certificates for such scrip to the company. The company gave him a receipt for the certificates and registered him as a shareholder. It was held that he was properly registered, and that he was a shareholder, although the shares purchased by him had never been formally transferred to him from the vendor as required by the company's special Act, and although the scrip certificates purported to be not transferable before the obtaining of the Act.

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Cheltenham, &c.,
Rail. Co. v.
Daniel.

On the other hand, in *The Irish Peat Company v. Phillips* (g), fifty shares, not numbered, nor distinguished from each other, had been allotted to the defendant. He had paid some calls upon these shares, and he was registered as holder of them, but he had received no certificates for them, and he had not, as required, executed the company's deed. He had not done anything as owner except pay calls. Further calls having been made, he declined to pay them, mainly on the ground that the terms contained in the company's prospectus and letters of allotment had not been adhered to. Being sued for calls, the Court of Queen's Bench, and also the Court of Exchequer Chamber, held that the defendant was not liable for them; but the two Courts differed in their reasons for so holding.

Non-execution
of company's
deed.
Irish Peat Co. v.
Phillips.

The Court of Queen's Bench expressed a strong opinion that neither the non-execution of the company's deed of settlement, nor the non-fulfilment of the terms contained in the company's prospectus and in the letters of allotment, afforded any defence to the action; but that Court thought that, the shares not having been numbered, calls could not be made upon them (h).

2 Q. B. 281; *Birmingham, Bristol, &c., Rail. Co. v. Locke*, 1 Q. B. 256; *London Grand Junc. Rail. Co. v. Graham*, ib. 271; *Cromford, &c., Rail. Co. v. Lacey*, 3 Y. & J. 80.

(f) 2 Q. B. 281.
(g) 1 B. & Sm. 598.
(h) See, as to this, *East Gloucestershire Rail. Co. v. Bartholomew*, L.R. 3 Ex. 15; *Ind's case*, 7 Ch. 485.

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The Court of Exchequer Chamber did not express any opinion upon the second point, and intimated considerable doubt whether the fact relied upon by the Court of Queen's Bench was material, but held that the non-execution by the defendant of the company's deed of settlement afforded a complete defence to the action.

Irish Peat Co. v.
Phillips.

Assuming that in the case in question the conduct of the defendant was not such as to preclude him from denying that he was a shareholder, the non-execution by him of the company's deed was a sufficient answer to the action (i); but it is conceived that the mere fact that a person has not executed a deed is not sufficient to exclude the application to him of the doctrine of estoppel by conduct where that doctrine would otherwise apply.

Cromford, &c.,
Rail. Co. v.
Lacey.

It is true, that in the cases cited below (k), and in all of which the defendant was held precluded by his own conduct from denying that he was a shareholder, it would seem that the company had no deed of settlement which shareholders were required to execute; but the same observation does not apply to *The Cromford and High Peak Railway Company v. Lacey* (l), which does not appear to have been cited in *The Irish Peat Company v. Phillips*. The Cromford and High Peak Railway Company was created by a special Act, which in terms incorporated the defendant and other persons who were in effect recited in the Act to have executed a certain deed which the defendant had not done. In an action for calls, it was held that the defendant was estopped by his conduct from denying that he was a shareholder, and the Court was particularly careful not to let it be supposed that the defendant had become a shareholder *nolens volens*, by reason of the mere terms of the Act. The defendant was held liable

(i) As in *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282.

(k) *Sheffield Rail. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham Rail. Co. v. Daniel*, 2 Q. B. 281; *Birmingham Rail. Co. v. Locke*, 1 Q. B. 256; *Lond. Gr. Junc. Rail. Co. v.*

Graham, 1 Q. B. 271. All of these were actions for calls in which the defendant had not executed the deed of transfer. In *Burnes v. Pennell*, 2 H. L. C. 497, what the defendant ought to have signed was not a deed but a minute in the company's books.

(l) 3 Y. & J. 80.

because, although he had not executed the company's deed as he ought to have done, he had with a full knowledge of all material facts acted and been treated as a proprietor of shares. — Bk. I. Chap. 2.
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The foregoing authorities are sufficient to illustrate the doctrine of estoppel as applied against individuals. The same doctrine, however, is applicable against companies, as is shown by those cases in which it has been held that companies cannot treat, as continuing shareholders, persons who have transferred their shares irregularly and improperly, but who have nevertheless been dealt with by the company as no longer members of it (*m*). These cases show conclusively that companies cannot, any more than individuals, take advantage of the non-observance of formalities which they have not insisted upon, and have, tacitly at least, dispensed with (*n*); and they show further, that if the directors of a company, in transacting such business of the company as they are authorised to transact, neglect to observe the formalities prescribed by the regulations of the company, and treat an informal act as a formal one, and thereby induce others to do the same, the company is estopped from afterwards disputing the validity of what has thus been treated as valid by all parties. This proposition is also supported by many decisions upon the question, who are and who are not contributories under the winding up Acts (*o*).

The proposition thus established is perfectly consistent with the doctrine that companies are not bound by the acts of their directors in matters as to which the directors are not the company's agents. The extent to which directors have power to bind their respective companies will be examined hereafter. It is sufficient to draw attention in the present place to the distinction between irregular acts and acts which are altogether unauthorised and are incapable of being confirmed; and to warn the reader not to conclude from the decisions just adverted to, that a company is estopped from disputing the

Distinction
between irregu-
lar and void
acts.

(*m*) *Bush's case*, L. R. 6 H. L. 37, and 6 Ch. 246; *Grady's case*, 1 De G. J. & Sm. 488; *Lane's case*, ib. 504. See, too, *Bargate v. Shortridge*, 5 H. L. C. 297; and *Taylor v. Hughes*, 2 Jo. & Lat. 24.

(*n*) As to how far a company is estopped by its own register, see *infra*, pp. 74 *et seq.*

(*o*) See *Straffon's executor's case*, 1 De G. M. & G. 576, and the cases in the last note but one.

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validity of acts done and treated as valid by its directors, if those acts are such as the directors have no authority to perform and the shareholders cannot ratify (*p*).

Illegal issue of shares.

The cases which give rise to most difficulty are those in which a person has in fact acted and been treated as a shareholder in respect of shares which the company had no power to issue. If the shares can, under any circumstances, legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him (*q*); but if they cannot legally exist, the person taking them cannot by estoppel or otherwise become a member in respect of them. A striking illustration of this is afforded by *The Bank of Hindustan v. Alison* (*r*), where one company had, in excess of its powers, amalgamated with another, and had, as part of the amalgamation scheme, issued new shares in excess of the authorised capital: the issue being held void, it was also held, that a person who had taken some new shares and paid on them, and had retained them for some time without objection was, nevertheless, not precluded from denying that he was a shareholder. This same principle has been recognised in equity as well as at law, as will be seen hereafter when treating of contributories and of the retirement of members (*s*).

Bank of Hindustan v. Alison.

Estoppel by deed.

In equity, the mere execution of a company's deed does not preclude a person from denying that he became a shareholder (*t*), and it is presumed that now the same doctrine will apply at law.

Effect of ignorance of material facts.

In connection with the doctrine of estoppel by conduct, it is important to consider the effect of ignorance of material facts. Upon general principles it is conceived that a person who induces others to act upon the faith of an untrue representation

(*p*) See *Grady's case*, 1 De G. J. & S. 488, and *Lane's case*, ib. 504, and the cases in the next three notes.

(*q*) *Campbell's case* and *Hippisley's case*, 9 Ch. 1; *Challis's case*, 6 Ch. 266; *Hare's case*, 4 Ch. 503.

(*r*) L. R. 6 C. P. 54 & 222. The Court of Chancery took a different view of the facts of this case (see

9 Ch. 1), for the reasons given in 9 Ch. 17.

(*s*) *Stace and Worth's case*, 4 Ch. 682; *Smith's case*, ib. 611; *Spackman v. Evans*, L. R. 3 H. L. 171.

(*t*) *Coleman's case*, 1 De G. J. & Sm. 495. It was otherwise at law. See *Hull Flux Co. v. Wellesley*, 6 H. & N. 38.

innocently made by himself, cannot, as against them, take advantage of his own want of information; as between them and him they ought not to be prejudiced by the circumstance that he would not have made the representation if he had been better informed. But except where others, either by having acted or having remained inactive on the faith of a representation, would be prejudiced if the person who made the representation was not bound by it, ignorance of material facts on his part affords a sufficient reason for not holding him estopped by what in such ignorance he may have said or done. Accordingly, it has been held that if a company, in ignorance of material facts, is induced to register an improper transfer of shares, or to issue a certificate of title to the transferee, it is not by this without more precluded from denying as against the transferee his title as a shareholder (*n*); but if the transferee has no notice of the impropriety in the transfer to himself, and has suffered loss by relying on the certificate, the company will be precluded from denying his title and will be liable for such loss whether it has arisen from action (*x*) or inaction (*y*) on his part. Nor can the company deny his title as against other persons who, on the faith of the company's register, or the certificate of his title, have *bonâ fide* bought his shares without notice of the impropriety in the transfer to himself (*z*).

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Secondly, as between an alleged shareholder and a creditor.

Whether a person is liable, as a shareholder, to be proceeded against by the creditors of an incorporated or quasi-

Effect of waiver
as between
shareholders
and creditors.

(*u*) *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188; *Hare v. London and North-Western Rail. Co.*, Johns. 722.

(*x*) See *Balkis Consolidated Co. v. Tomkinson* [1893], A. C. 396, affirming *Tomkinson v. Balkis Consolidated Co.* [1891], 2 Q. B. 614, and other cases cited, *infra*, p. 82.

(*y*) *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833. In this case the shares had not been transferred in the company's books. *Semble*

the company would not be estopped if the certificate was based on a forged transfer innocently lodged with the company by the transferee. See the remarks in this case and in the case in note (*x*).

(*z*) *In re Otto's Kopje Diamond Mines, Ltd.* [1893], 1 Ch. 618. See *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420; *Ward v. South-Eastern Rail. Co.*, 2 E. & E. 812; *Bahia and San Francisco Rail. Co.*,

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incorporated company depends upon the construction of the statute or charter which enables him to be proceeded against; and in cases of this kind which have generally arisen in courts of law, those courts have adhered very strictly to the language of the statute or charter (a). The doctrine of estoppel has not been applied in these cases, so as to enable a creditor to proceed against a person who, though not a shareholder, has been treated by the company as if he were one, or so as to prevent a creditor from proceeding against a person who has not ceased to be a shareholder according to the company's regulations, but who has been treated by the company's officers as no longer a shareholder in point of fact.

*Moss v. Steam
Gondola Co.*

In *Moss v. The Steam Gondola Company* (b), a person who had acted as a director of a company was held not to be liable to creditors as a shareholder as he had not executed the company's deed, which was necessary to render him a shareholder. Upon the same principle, where a married woman was a shareholder in a company, and her husband was not entitled to act as a shareholder until he had complied with certain regulations, it was held that he was not liable to be proceeded against as a shareholder by creditors, as he had not complied with those regulations, although he had received his wife's dividends, and had voted at meetings, and otherwise acted as a shareholder (c).

These principles were carried to their utmost extent in another case, where a person who had, in fact, retired from a company, was sought to be proceeded against as if he were still a shareholder. The case in question is instructive, as it was litigated both at law and in equity, and was carried to the House of Lords; it moreover shows, better than any other, the different tendencies of the old Courts of law and equity to hold companies bound by the conduct of their managers and

L. R. 3 Q. B. 584; *Hart v. Frontino and Bolivia Mining Co.*, L. R. 5 Ex. 111, and see also *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188. A "certification" is not, and has not the same effect as, a certificate, see *infra*, p. 83.

(a) See *Portal v. Emmens*, 1 C. P. D. 201 & 664, and the cases there

cited. Compare *Kipling v. Todd*, 3 C. P. D. 350, and *infra*, Bk. II., c. 7, § 3.

(b) 17 C. B. 180. See, too, *Bailey v. Universal Prov. Life Ass.*, 1 C. B. N. S. 557.

(c) See *Ness v. Angas*, 3 Ex. 805; *Ness v. Armstrong*, 4 ib. 21.

directors in matters of mere form. The case in question was decided at law under the name of *Bosanquet v. Shortridge*, in equity under the name of *Shortridge v. Bosanquet*, and in the House of Lords under the name of *Bargate v. Shortridge*. Bk. I. Chap. 2.
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In *Bosanquet v. Shortridge* (d), as it first came before the Court, the plaintiff, who had obtained judgment against the public officer of a banking company, sought to enforce that judgment against the defendant, who was alleged to be a member of the company. The defendant had been a shareholder, but he had sold his shares to another person, and the transfer thereof to him was registered in the company's register. By one of the rules of the company no person was to be registered as a shareholder without the consent of a board of directors, and in this case no such consent had been obtained; and some time after the transfer had been registered the directors declared the transfer void, and they put the defendant again on the list, and returned him as a shareholder. They did this for the express purpose of enabling the plaintiff, as a creditor, to proceed against him. It appeared that in point of fact transfers had been for years registered like the one in question, viz., without the observance of the formalities required by the company's deed. The Court of Exchequer held that the defendant had not ceased to be a shareholder; that he still was a shareholder within the true intent of the company's deed; and that he was therefore liable to be proceeded against by the creditors of the company. Bosanquet v.
Shortridge.

In consequence of this decision, the suit of *Shortridge v. Bosanquet* (e) was instituted for the purpose, first, of having it declared that the plaintiff (i.e., the defendant at law) was no longer a shareholder in the company, that his name might be erased from its books, and not be returned to the stamp office as if he were a member; and for the purpose, secondly, of restraining the creditor from proceeding to execution against the plaintiff. The Master of the Rolls held that, after what had taken place, the company could not insist that the plaintiff was still a shareholder, or that his transferee was not: and, it being established that the creditor was proceeding at the Shortridge v.
Bosanquet.

(d) 4 Ex. 699.

(e) 16 Beav. 84.

Bk. I. Chap. 2. instigation of the company, an injunction was granted as
Sect. 3. . . . prayed by the bill.

Bargate v.
Shortridge.

From this decree the creditor appealed to the House of Lords, but the decree was there affirmed, upon the ground that the company could not take advantage of the non-observance by its own officers of formalities required by its own deed (*f*).

Taylor v.
Hughes.

The decision thus affirmed is in conformity with a prior decision in Ireland in a case where it was held that a shareholder in a banking company had, as between himself and the company, ceased to be a member thereof, although he had retired irregularly; and that, having ceased to be a member as between himself and the company, he was not liable to be sued as a member by a creditor of the company, instigated to sue him by its directors (*g*).

Observations on
these cases.

In both of these cases the creditor was suing at the instigation of the company. Had it not been for this circumstance there would have been no ground on which a Court of equity could have restrained him from exercising his legal rights. Nor is there any case in which a Court of equity has assisted a creditor against a person held at law not to be liable to be proceeded against as a shareholder. Indeed, except under very special circumstances, a Court of equity would have had no jurisdiction in the matter. If, however, such a case as *Bargate v. Shortridge* were now to arise, the equitable principles on which it was ultimately decided would be applicable to the proceedings taken by the creditor.

SECTION III.—OF REGISTERS OF SHAREHOLDERS AND CERTIFICATES OF TITLE TO SHARES.

Register of
shareholders.

With reference to the question whether a person is or is not a shareholder in a company, the state of its register of shareholders is of considerable importance.

(*f*) *Bargate v. Shortridge*, 5 H. L. curring.
C. 297, decided by Lord St. Leonards, (*g*) *Taylor v. Hughes*, 2 Jo. & Lat.
affirming the judgment of Sir John 24.
Romilly, Lord Cranworth not con-

Shares in companies being marketable commodities, transferable from one person to another, some method of registration is indispensable, in order that the persons who are at any given time members of the company may be known. But a register of shareholders would be of little use if it were not admissible in evidence both for and against every person whose name is upon it; and it is therefore necessary, not only to have a register, but to make it evidence in judicial proceedings. The simplest, and at the same time most just way of accomplishing this is to compel every member either to write his name in a book kept by the company, or to give some officer of the company a written authority to insert his name therein. Another, but much more arbitrary way, is to make it the duty of every company, or of some official, to keep a register of shareholders, and to make that register evidence against any one whose name may be upon it, without the necessity of showing by what authority it was put there. The former of the modes is commonly had recourse to in mining districts where partnerships with transferable shares have long been known; but the latter mode has been adopted by the legislature, and prevails in most companies governed by Acts of Parliament (*h*). A parliamentary register of shareholders thus becomes a most important document; for, speaking generally, unless a person is on it, he is not entitled to the rights of a shareholder, whilst if he is on it, he is subject to all the liabilities of a shareholder, unless he can show that his name ought not to have been on the list. The Acts of Parliament relating to registers of shareholders are unfortunately numerous and differently worded, and it is necessary, before determining the effect of being on or off the register of a particular company, to examine the provisions of the Act which applies to it.

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Register as
evidence.

One or two general rules relating to these registers regarded as evidence of membership may, however, be usefully adverted to:—

General rules on
this subject.

1. The rule that a register or official return shall be evidence in favour of a company keeping or making it, is

(*h*) The making of companies' and *Taunton, &c., Co. v. Amos*, books evidence against their mem- 1 M. & S. 569.
bers is not a new device; see *Bristol*

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contrary to general principles of evidence and is a great privilege, and in order to enjoy this privilege the register or return must be kept or made as required by the statute making it evidence (i).

2. At the same time, if the provisions of the statute are substantially complied with, the register or the official return, as the case may be, will be admissible in evidence, although it may be in some respects inaccurate or informal, *e.g.*, if a shareholder's residence is omitted (k); if some of the amounts paid are not entered (l); if the numbers of the shares are omitted (m); if the heading of the return is not strictly accurate (n); if the return does not purport to be signed by the person whose duty it is to sign it (o); if it was signed at the wrong time (p). Moreover, inaccuracies as to some persons do not prevent the register or return from being evidence against others as to whom there is no inaccuracy (q). But if what is called a register is only a rough memorandum, it cannot be regarded, although it is sealed (r). Memoranda or allotment sheets not intended as a register but as materials from which a register is to be prepared cannot be treated as a register (s). A share ledger, however, has been held sufficient (t).

3. A person who assumes a fictitious name or whose name is inaccurately stated, but whose identity can be established,

(i) *Bain v. Whitehaven, &c., Rail. Co.*, 3 H. L. C. 1.

(k) *Wills v. Murray*, 4 Ex. 843.

(l) *Bain v. Whitehaven Rail. Co.*, 3 H. L. C. 1; *Lond. and Grand Junc. Rail. Co. v. Freeman*, 2 Man. & Gr. 606; *Birmingham and Bristol Rail. Co. v. Locke*, 1 Q. B. 236; *Lond. and Grand Junc. Rail. Co. v. Graham*, ib. 271.

(m) *Ib. and East Gloucestershire Rail. Co. v. Bartholomew*, L. B. 3 Ex. 15.

(n) *Bain v. Whitehaven Rail. Co.*, 3 H. L. C. 1; *Dosset v. Harding*, 1 C. B. N. S. 524; *Powis v. Harding*, ib. 533.

(o) *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705.

(p) *Henderson v. Royal British*

Bank, 7 E. & B. 356; *Daniel v. Royal British Bank*, 1 H. & N. 681.

(q) *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448; *London and Brighton Rail. Co. v. Fairclough*, 2 ib. 674.

(r) *Wolverhampton New Waterworks Co. v. Hawkeford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 456, approved by the Exchequer Chamber in *Irish Peat Co. v. Phillips*, 1 B. & Sm. 638. See, too, *Birkenhead, Lancashire, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426; *Cheltenham and Great Western Rail. Co. v. Price*, 9 C. & P. 55.

(s) *Ex parte Cammell* [1894], 2 Ch. 392.

(t) *Weikersheim's case*, 8 Ch. 831.

cannot escape liability as a shareholder on the ground of the inaccuracy (*u*); the use of a fictitious name only increases the difficulty of proving identity (*x*). Bk. I. Chap. 2.
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But in these as in all other cases there must be an agree- Coventry's case.
ment to take the shares. For instance, if, in pursuance of a scheme among the directors for making a fictitious allotment of shares, A., without any intention of taking shares himself and without authority from B., applies for and obtains an allotment of shares in B.'s name, A. may be liable in damages for fraud or breach of warranty of authority, but neither he nor B. will be liable as a shareholder (*y*).

4. The register or return is no evidence of the membership of a person except at and after the date at which the register or return becomes official (*z*).

5. Unless the statute making the register or return evidence, clearly and indisputably makes it conclusive evidence, the register or return will be *prima facie* evidence only of the truth of the statements in it; so that not only may a person whose name is on the register or return show that his name ought not to have been there (*a*), but a person whose name is not on it may be shown to have been in fact a member when the register or return became official (*b*); so if no register has been kept (*c*).

(*u*) *Thomson v. Harding*, 1 C. B. N. S. 555; *Cloves v. Brettell*, 11 M. & W. 461; *Pugh and Sharman's case*, 13 Eq. 566; *Cox's case*, 4 De G. J. & Sm. 53.

(*x*) *Arthur v. Midland Rail. Co.*, 3 K. & J. 204.

(*y*) *Coventry's case* [1891], 1 Ch. 202.

(*z*) *Aylesbury Rail. Co. v. Thompson*, 2 Ra. Ca. 668; *Cheltenham Rail. Co. v. Price*, 9 C. & P. 55. Compare *Bosanquet v. Shortridge*, 4 Ex. 699.

(*a*) See *Portal v. Emmens*, 1 C. P. D. 212; *Hallmark's case*, 9 Ch. D. 329; *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469; *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282; *Shropshire Un. Canal Co. v. Ander-*

son, 3 Ex. 401; *Bailey v. Universal Prov. Life Ass.*, 1 C. B. N. S. 557; *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Same*, ib. 736; *Edwards v. Kilkenny Rail. Co.*, 14 C. B. N. S. 526; *Birch's case*, 2 De G. & J. 10.

(*b*) See *Rastrick v. Derbyshire, &c., Rail. Co.*, 9 Ex. 149; *Prescott v. Buffrey*, 1 C. B. 41; *Bank of England v. Johnson*, 3 Ex. 598; *Wolverhampton Waterworks Co. v. Hawkesford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; *Whittell's case*, 2 De G. & J. 577. The question whether a person is a contributory or not in consequence of being on or off the register will be adverted to in a subsequent chapter.

(*c*) See *Portal v. Emmens*, 1 C. P.

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6. It follows that a company is not necessarily estopped by its own register. This was assumed by the Court of Exchequer in *The Waterford and Wexford Railway Company v. Pidcock* (d), where the defendant was held not to be liable to calls because, though on the register, he had been placed there before he had become a shareholder; and because, notwithstanding the register, he was not entitled to exercise the rights of a shareholder (e). So where a company has, in ignorance of material facts, registered a forged or improper transfer, it is not estopped merely by its register from denying as against the registered transferee that he is a shareholder (f).

7. A person improperly registered as a shareholder in a company cannot be considered as holding himself out as a shareholder merely because he takes no steps to have his name removed (g). But as regards some companies, it is enacted that a person once properly registered as a shareholder is to be deemed a shareholder so long as his name remains on the register (h); and as will be seen hereafter, a person once put on the register with his consent may lose his right of repudiating his shares by delaying to have his name removed (i).

Correction of
register.

Where a company or its officers are required to keep a register of shareholders, it is their duty to keep such register accurately, and if they refuse to insert the name of a person entitled to be registered, or to erase the name of a person improperly registered, in either case upon complaint being made to the proper tribunal, the company or its officers will be ordered to correct the register. Several modern Acts of

D. 201 & 664, which turned on the Companies Clauses Cons. Act and a special Act.

(d) 8 Ex. 279.

(e) See, too, *Shropshire Union, &c., Co. v. Anderson*, 3 Ex. 401, and the other cases in notes (a) and (b).

(f) *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188; *Hure v. Lond. and N.-W. Rail. Co.*, Johns. 722. But *secus* if the transferee or other persons have acted on the faith of the register, see cases *ante*,

p. 70, and *infra*, p. 82.

(g) See *Somerville's case*, 6 Ch. 266; *Bullock v. Chapman*, 2 De G. & S. 211; *Birch's case*, 2 De G. & J. 10.

(h) See *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 92. This subject will be reverted to hereafter.

(i) See *Oakes v. Turquand*, L. R. 2 H. L. 325, and other cases of that class.

Parliament contain express provisions upon the subject of correcting registers, and these provisions will be noticed hereafter when treating of the companies to which they relate. But even where there is no statutory enactment expressly applicable to the case, a mandamus or an injunction will be granted to compel a company, required by statute to keep a register, to insert a name improperly excluded (*k*), or to compel the company to remove a name improperly inserted (*l*). A mandamus will not, however, go to compel a company to remove its seal from a register which it has sealed, although it may be shown that the register is incorrect, and that it has been sealed without authority (*m*).

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Mandamus and
injunction.

A person asserting his right to be on the register must prove his title to the shares in respect of which he claims to be registered (*n*), and his right to be on the register (*o*); but if he has already been registered, and he complains of being struck off, the onus is on the company to show its right to remove his name (*p*). It has been held that a mandamus will not be granted in favour of a person who seeks to become a registered shareholder for the purpose of being troublesome (*q*); nor in favour of a person whose own negligence has occasioned the state of things which he seeks to have rectified (*r*).

(*k*) *R. v. Reg. of Jt. St. Companies*, 21 Q. B. D. 131; *Paris Skating Rink Co.*, 6 Ch. D. 731; *R. v. Carnatic Rail. Co.*, L. R. 8 Q. B. 299, a case of a married woman; *R. v. Shropshire Union Rail. Co.*, L. R. 8 Q. B. 420, reversed but not on this point, L. R. 7 H. L. 496; *Norris v. Irish Land Co.*, 8 E. & B. 512; *Ward v. S.-E. Rail. Co.*, 2 E. & E. 812.

(*l*) *Eustace v. Dublin Trunk Rail. Co.*, 6 Eq. 182; *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84. In *Bullock v. Chapman*, 2 De G. & S. 211, the Court declined to interfere, the case not being sufficiently clear.

(*m*) *Ex parte Nash*, 15 Q. B. 92.

(*n*) *Daly v. Thompson*, 10 M. & W. 309.

(*o*) *British Sugar Co.*, 3 K. & J. 408.

(*p*) See *Ward v. S.-E. Rail. Co.*, 2 E. & E. 812; *East Wheal Martha Mining Co.*, 33 Beav. 119.

(*q*) See *Reg. v. Liverpool, Manchester, &c., Rail. Co.*, 21 L. J. Q. B. 284.

(*r*) See *Ex parte Swan*, 7 C. B. N. S. 400, and *Swan v. North Brit. Australian Co.*, 7 H. & N. 603, and 2 H. & C. 175. The extreme diversity of opinion of the judges before whom this important case came renders it unsatisfactory as a guide for the future. Compare *Taylor v. Great India Peninsula Rail. Co.*, 4 De G. & J. 559; and see the observations of V.-C. Malins in 11 Eq. 319.

Bk. I. Chap. 2. Moreover, where an important question, *e.g.* liability to calls, Sect. 3. is actually pending between a person and a company, a summary application to rectify the register will not be entertained unless it can be shown that it is necessary to rectify the register in order that the real question in dispute may be fairly decided (*s*). But the mere fact that the application to have the register rectified involves the decision of an important and difficult question is not sufficient to induce the Court to refrain from ordering it to be rectified (*t*). Nor will the Court decline to order the name of a person to be struck off the register simply because his shares are marked forfeited, and his name has been already removed (*u*). The order to remove is a great security.

Correction of register.

Where a register is rectified by order, it should so appear on the register (*x*).

Where a person on the register applies to have his name struck off, and the name is alleged not to refer to him but to some other person, the Court will not expunge the name until satisfied upon the question of identity (*y*).

The right of a married woman to be registered has been noticed already (*z*).

With respect to the registration of titles to shares, it has been held that a company is not bound to register complicated deeds of transfer, *e.g.*, marriage settlements, by which shares are assigned to trustees upon the usual trusts for the husband and wife, and their children (*a*).

Right of company to alter its register.

Companies are too frequently in the habit of altering their own registers by striking off the names of persons whom they do not wish to recognise as shareholders and by substituting

(*s*) *Anglo-French Porcelain Co. v. Harris*, 5 H. & N. 809; *British Sugar Refining Co.*, 3 K. & J. 408. These cases, however, turned on Acts of Parliament differently worded from the Companies Act, 1862, as to which see *infra*.

(*t*) *Higg's case*, 2 Hem. & M. 657; *Los' case*, 6 N. R. 327.

(*u*) *Martin's case*, 2 Hem. & M. 669; *Los' case*, 6 N. R. 327.

(*x*) See *Iron Ship-Building Co.*, 34 Beav. 597.

(*y*) See *Webb's case*, 9 Jur. N. S. 856, where a person was removed from the list of contributories, but his name was left on the register of shareholders.

(*z*) *Ante*, pp. 57 *et seq.*

(*a*) *Reg. v. General Cemetery Co.*, 6 E. & B. 415; *Copeland v. North-E. Rail. Co.*, *ib.* 277.

other names in their places. Such proceedings cannot be too strongly reprobated (*b*). When once a person is registered as a shareholder, and his name has been since removed, the onus of justifying the removal is on the company; and it has been held, that even where his title is defective the company has no right to strike off his name unless his shares are claimed by a person establishing a better title to them (*c*). A company can however rectify its register in order to correct its own mistakes (*d*).

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A person entitled to be registered as a shareholder by a company can maintain an action against the company, or those of its officers whose duty it is to register him as a shareholder, if they wrongfully refuse to register him. In such an action it is no defence that the register is full, if it is so improperly (*e*): and if the plaintiff complains that, in consequence of his name not being registered, his shares have been forfeited without notice to him, it is no defence that the forfeiture is a mere nullity, and that the plaintiff has therefore sustained no damage (*f*). In like manner a person who has transferred his shares is entitled to maintain an action for damages against a company for improperly refusing to register the name of his transferee (*g*). The principles on which these decisions are based are, it is conceived, sufficient to support an action for damages by a person improperly inserted in a company's register; but the writer is not aware of any case bearing directly on this point.

Actions for improper exclusion from or insertion in register.

It has been already seen that if a person is bound by agreement with a company to take shares in it, the company is entitled without more, to act on the agreement and to register him as a shareholder (*h*).

Right to register a person against his will.

(*b*) See the judgments in the cases below.

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(*c*) See *Ward v. South-E. Rail. Co.*, 2 E. & E. 812; *Hart v. Frontino and Bolivia Mining Co.*, L. R. 5 Ex. 111. Compare *Hare v. Lond. and North-W. Rail. Co.*, Johns. 722.

(*f*) *Catchpole v. Ambergate, &c., Rail. Co.*, 1 E. & B. 111.

(*d*) *Hartley's case*, 18 Eq. 542, and 10 Ch. 157; *Re Etna Ins. Co.*, Ir. Rep. 7 Eq. 264.

(*g*) *Bulkia Consolidated Co. v. Tomkinson* [1893], A. C. 396, and other cases of that class cited p. 82, and *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882.

(*e*) *Daly v. Thompson*, 10 M. & W.

(*h*) *Ante*, p. 63, 64.

L.C.

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Certificates of
title.

In addition to the evidence of membership obtainable from registers of shareholders, many companies are required by statute to give every shareholder, on demand, a sealed certificate of his ownership of the shares, to which he is entitled. The object of this is to enable a shareholder to prove that he is such; and particularly to enable him, upon a sale of his shares, to prove his title to them to the satisfaction of a purchaser, and to show how much has been paid up in respect of them (*i*). The company cannot dispute the truth of the certificate as against the person to whom it is issued if he has suffered loss by acting (*k*) or remaining inactive (*l*) on the faith of it, or as against a person who has bought on the faith of it (*m*). But there is no estoppel as against a person who knows that the certificate is untrue (*n*) except perhaps if he derives title through a purchaser without notice of the untruth (*o*). But the certificate applies only to the legal, not

(*i*) See upon this subject, *Hare v. Waring*, 3 M. & W. 362; *Curling v. Flight*, 6 Ha. 41, and 2 Ph. 613; *Shaw v. Fisher*, 2 De G. & S. 11.

(*k*) *Balkis Consolidated Co. v. Tomkinson* [1893], A. C. 396, affirming *Tomkinson v. Balkis Consolidated Co.* [1891], 2 Q. B. 614; *Bloomenthal v. Ford* [1897], A. C. 157, reversing *Ex parte Bloomenthal* [1896], 2 Ch. 525.

(*l*) *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833, distinguishing *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188, on the ground that in that case the transferee had conduced to the mistake by himself lodging with the company the forged transfer on the faith of which the certificate was issued. See also *Parbury's case* [1896], 1 Ch. 100. And as to estoppel by a letter accompanying the certificate see *per Vaughan Williams Macdonald, Sons & Co.* [1894], 1 Ch., p. 101.

(*m*) See the following cases in which the company was estopped (1) from denying that the amount

stated by the certificate to have been paid up was paid. *Barrow's case*, 14 Ch. D. 432; *Burkinshaw v. Nicolls*, 3 App. Ca. 1004, affirming *British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533; and compare the cases in the next two notes; (2) from denying the title of the person named in the certificate. *In re Otto's Kopje Diamond Mines, Ltd.* [1893], 1 Ch. 618; *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103; *Bahia v. San Francisco Rail. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino and Bolivia Mining Co.*, L. R. 5 Ex. 111; and compare *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188.

(*n*) *Ex parte Sandys*, 42 Ch. D. 98; *In re London Celluloid Co.*, 39 Ch. D. 190; and the judgment of Wright, J., in *Markham and Dare's case* [1899], 1 Ch. 414.

(*o*) Compare *Barrow's case*, 14 Ch. D. 432, which was followed in *Ex parte Sandys*, 42 Ch. D. 98 (as to 150 shares repurchased), with *In re London Celluloid Co.*, 39 C. D.

to the equitable title of the person named in it (*p*). No person is entitled to demand a certificate of title to shares in a company until he has done everything necessary to constitute himself a shareholder in the full sense of the word (*q*). Bk. I. Chap. 2.
Sect. 3.

A "certification" of shares must not be confused with a certificate; it is merely a representation that the certificate of the shares described in the transfer and other documents (if any) necessary to show the transferor's title have been lodged with the company, and it is not a representation as to the validity of the documents or of the transferor's title (*r*). Moreover, it has recently been decided by the House of Lords that a company is not estopped by a certification given by its secretary from showing that the certificate and the other documents were not in fact lodged with him (*rr*).

A person may be proved to be a member of a company by his own admissions. Thus it has several times been held that a person who has admitted himself to be a shareholder in a company constituted by deed, may be rendered liable as a shareholder without any evidence being given as to that deed (*s*).

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions (*t*). This seems to have been the true ground of the decision in the much-debated case of *Vice v. Anson* (*u*). There the defendant supposed

190, and *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188.

(*p*) *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420.

(*q*) *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Anglo-Californian Gold Co.*, ib. 736.

(*r*) *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512.

(*rr*) *George Whitechurch, Ltd. v. Cavanagh*, 17 Tim. L. R. 746. *Semble, McKay's case* [1896], 2 Ch. 757, must be treated as overruled, but notice that in the case before the House of Lords the secretary

was a party to the fraud.

(*s*) *Harvey v. Kay*, 9 B. & C. 356; *Ralph v. Harvey*, 1 Q. B. 845; and see *Tredwen v. Bourne*, 6 M. & W. 461.

(*t*) See *Ridgway v. Philip*, 1 Cr. M. & R. 415.

(*u*) 7 B. & C. 409, and *Moo. & M.* 98. See, on this case, *Owen v. Van Uster*, 10 C. B. 318, and *qu.* if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier?

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herself to be a shareholder in a mine; she had in private letters and in private society written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

SECTION IV.—OF SCRIP.

Scrip.

In order to enable persons who do not desire to become shareholders to acquire the right so to become and to transfer that right to others, recourse is had to what are called *scrip certificates*.

A scrip certificate is an acknowledgment by a company or its projectors that the person named in the certificate (or more commonly the holder) is entitled to a certain specified number of shares in the undertaking. The certificate represents a right to acquire, but not necessarily an obligation to take a share (x). The certificate must have a penny stamp (y).

Scrip companies.

In some companies nothing is required to convert scrip-holders into shareholders. Companies constituted upon this principle are called scrip companies, and in them scrip and shares are synonymous, there being in fact no difference between scripholders and shareholders (z).

Scripholders
converted into
shareholders.

Usually, however, a person entitled to scrip does not acquire the rights of an actual shareholder until his scrip certificates have been delivered up and exchanged for share certificates,

(x) *Eustace v. Dublin Trunk Rail. Co.*, 6 Eq. 182; *Ormerod's case*, 5 Eq. 110; *Ex parte Collum*, 9 Eq. 236; *Re Littlehampton Steam Ship Co.*, 34 Beav. 256, and 2 De G. J. & Sm. 521; *Jackson v. Cocker*, 4 Beav. 59. *Clark v. Newsam*, 1 Ex. 131, shows that to forge scrip was only

a misdemeanour under 1 Wm. 4, c. 66. Compare 24 & 25 Vict. c. 98, § 23.

(y) Stamp Act, 1891, 54 & 55 Vict. c. 39, schedule

(z) As to the legality of scrip companies, see *infra*, ch. v.

nor until his name has been inserted upon the company's register of shareholders. Generally speaking, after a company is formed, its scrip is called in; *i.e.*, the holders of the scrip are required to exchange their certificates for share certificates, and to do whatever else may be necessary to render them members of the company, as distinguished from persons who have only a right to become members. In such cases as these, scripholders are not shareholders, nor are they partners either with each other or with the promoters of the company (*a*). This doctrine results from the distinction between agreements to form a future partnership and contracts for a present partnership (*b*); but as will be seen hereafter, it does not follow that a company which progresses no further than the issue of scrip cannot be wound up; nor that upon the winding up of such a company scripholders are not liable to be put upon the list of contributories (*c*).

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Sect. 4.

The effect of a transfer of scrip will be alluded to hereafter, *Transfer of scrip*, when treating of the transfer of shares. It may, however, be noticed here that scrip certificates to bearer have not yet been judicially treated as negotiable instruments; but if they are proved to be so by custom in this country (*d*) in any particular case, they cannot be recovered from a *bonâ fide* holder for value without notice of any infirmity in the title of the person from whom he has taken them (*e*).

(*a*) See the cases in note (*x*), and *Fox v. Frith*, 1 Car. & M. 502.

(*b*) As to which, see Partn., p. 15 *et seq.*

(*c*) See, on this subject, *Barclay's case*, 26 Beav. 177; *Re Aston*, 27 ib. 474, and 4 De G. & J. 320; *Grise-wood and Smith's case*, 4 De G. & J. 544, and the cases cited in note (*x*).

(*d*) *Picker v. London and County Banking Co., Ltd.*, 18 Q. B. D. 515; negotiability abroad is not sufficient.

(*e*) See *Goodwin v. Roberts*, 1 App. Cas. 476; a case of a foreign government loan. In *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194,

the scrip was that of a banking company, and the mercantile usage was proved. *Qu.*, how often will it have to be proved before the usage is judicially recognised? See, as to other instances of securities being treated as negotiable by custom, *Bechuanaland Exploration Co. v. London Trading Bank* [1898], 2 Q. B. 658; *Venables v. Baring Bros. & Co.* [1892], 3 Ch. 527; *London Joint Stock Bank v. Simmons* [1892], A. C. 201, reversing *Simmons v. London Joint Stock Bank* [1891], 1 Ch. 270. These cases will be noticed hereafter: see pp. 300, 301.

CHAPTER III.

OF MEMBERSHIP INDUCED BY FALSE STATEMENTS.

HAVING now explained the doctrines relating to agreements to take shares, and what constitutes membership, it will be convenient to consider the position of persons who have been induced to enter into such agreements and to take shares by false and, in many cases, fraudulent misrepresentations.

In discussing this subject it is proposed first to consider the effect of false statements apart from statute, and then to deal with the statutory enactments relating thereto, of which the Directors Liability Act, 1890, is the chief.

SECTION I.—EFFECT OF FALSE STATEMENTS APART FROM STATUTE.

1. *Requisites for Redress.*

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Sect. 1.

Mis-statements
in prospectus.

Nothing is, unfortunately, more common than the occurrence of serious mis-statements in a company's prospectus. These mis-statements are sometimes the result of ignorance and carelessness, but they are sometimes also the result of deliberate fraud. Whatever may be their moral aspect, their effect is to induce persons to take shares on the faith of their accuracy; and the question then arises whether the shares so taken can be repudiated, or what remedy, if any, is open to those who have been induced to take shares on the faith of the truth of the statements.

It will be convenient to consider first those requisites which must be proved in order to entitle the complainant to any redress at all, and then to consider what further is necessary to entitle him—1. To relief against the company by way of

rescission of contract and indemnity; 2. To relief in the shape of damages against the individuals who have misled him.

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In the first place it must be observed that statements which are not statements of fact, but which are expressions of sanguine expectations are not actionable, although they prove to be unfounded (a); nor, are extravagant expressions of opinion as to value (b).

Mis-statement
must be of
facts.

In *Bellairs v. Tucker* (c) the prospectus stated that for reasons given a dividend of 50 per cent. was confidently expected; the reasons were unsatisfactory, and the company proved a total failure; but there was no actual mis-statement of any fact, and an action brought to recover damages from those who issued the prospectus failed.

Bellairs v.
Tucker.

It must not, however, be assumed that an expression of an opinion, or of an intention, or of a purpose, may not be a statement of fact within this rule. If an opinion, intention, or purpose is not in truth entertained, those who say the contrary mis-state a fact. Therefore, in *Edgington v. Fitzmaurice* (d), where a prospectus was issued inviting subscriptions to debentures for a purpose, which was not the true purpose for which money was wanted, a person who took debentures which proved worthless was held entitled to maintain an action against those who had fraudulently misled him.

False statement
of intention.

Edgington v.
Fitzmaurice.

Secondly, a mis-statement of fact must, in order to entitle a person to any relief in respect of it, be untrue when made; or, if then true, must be untrue when it is intended to be acted upon and is acted upon. It has already been seen (e) that if an application for shares is made on the faith of a statement which is true when made, but which is not true when shares are allotted to the applicant, he may refuse to take them. Further, a statement that an existing condition of things is likely to last, is not true if circumstances have occurred which will soon put an end to it; and a statement that a condition of things exists may be so expressed as to be intended to lead,

Statement must
be untrue.

(a) *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520. *Gordon*, 23 Q. B. D. 354.

(b) *Denton v. Macneil*, 2 Eq. 352. (c) *Anderson's case*, 17 Ch. D. 373,

(c) 13 Q. B. D. 562. *ante*, p. 24. Compare *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520.

(d) 29 Ch. D. 459; see also *R. v.*

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and so as in fact to lead, to the inference that the condition not only exists now but will exist for some reasonable time to come. A statement to this effect is fraudulent if the person who makes the statement knows that permanence in the sense implied cannot be relied upon, or that the state of things has ceased when its continuance is still believed in by a person acting on the faith of a statement (*f*). But in the absence of such knowledge the fact that what was true has ceased to be so, cannot entitle a person who is a shareholder to relief unless indeed there is some contract express or implied guaranteeing him against the consequences of change.

Specific mis-
statement not
necessary.

A prospectus may contain a mis-statement of fact although no specific allegation of fact contained in it is false; it is sufficient if the prospectus taken as a whole contains a false representation of fact (*g*).

Concealment of
material facts.

By the law of this country the duty of a person bargaining with another to disclose all material facts known to himself is confined to a very limited class of contracts (*h*). In all contracts of buying and selling the maxim is *caveat emptor*; and contracts to take shares are apparently governed rather by this principle than by any other (*i*). At the same time, if persons issue prospectuses or make statements, and fraudulently suppress material facts which render the statements made untrue, an action for damages may be sustained against them (*k*). *A fortiori*, will such a concealment support an action for rescission of contract? But such an action cannot apparently be supported by a person induced to take shares by the concealment of a material fact unless the statements actually made are thereby rendered misleading (*l*).

(*f*) See *Traill v. Baring*, 4 De G. J. & S. 318; and *Brownlie v. Campbell*, 5 App. Cas. 950, per Lord Blackburn.

(*g*) *Aaron's Reefs v. Twiss* [1896], A. C. 273; *Greenwood v. Leather Shod Wheel Co.* [1900], 1 Ch. 421.

(*h*) See *Davies v. Lond. and Prov. Marine Ins. Co.*, 8 Ch. D. 469, a case of suretyship.

(*i*) See the next note. In *Troycross v. Grant*, 2 C. P. D. 469,

reasons are given against this view.

(*k*) See *Peek v. Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79; *Arkwright v. Newbold*, 17 Ch. D. 301; *Dringbier v. Wood* [1899], 1 Ch. 393, a case under the Directors Liability Act, 1890, in which fraud was not alleged.

(*l*) See the last note and the judgments in *New Sombrero Phosphate Co. v. Erlanger*, 3 App. Cas. 1218, and 5 Ch. D. 73, a promoter's

Thirdly, the mis-statement of fact must have been made with a view to induce the person complaining of it or persons in general to act upon it. A mis-statement made by A. to B., but not intended to influence C., nor any class of persons of whom C. is one, does not entitle C. to redress, although he may have heard of it and acted upon it and suffered loss (*m*). Bk. I. Chap. 3.
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Intention with
which false
statement is
made.

Fourthly, a mis-statement of fact in order to entitle a person to any relief in respect of it, must be material to the contract into which the statement induced him to enter. It must be a statement but for which he would not have entered into it. Mis-statements relating to trifling matters of detail, or statements, which though not true when made were true before their untruth became important, are not sufficient to sustain either an action for damages or for rescission of contract (*n*). False statement
must be mate-
rial.

In *Ship v. Crosskill* (*o*) a prospectus stated that more than half the capital had been subscribed for. This was not true; but it was true soon afterwards, and before the plaintiff applied for shares. He was held not entitled to maintain an action for damages against the directors for misrepresentation. Ship v.
Crosskill.

Fifthly, the person complaining of the mis-statement must in fact have acted on the faith of it (*p*). Further, if the statement on which he relies is fairly capable of two meanings, one true and the other false, he must show which meaning he attached to it, and that he understood it in the sense in which it was false. *Smith v. Chadwick* (*q*) is the leading case on this point. The statement there was—"The present value of the turnover or output of the entire works is over 1,000,000*l*. False statement
must have been
acted upon.

Ambiguous
statements.

Smith v.
Chadwick.

case; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Pulford v. Richards*, 17 Beav. 87; *McKeown v. Boudard Peveril Gear Co.*, 65 L. J. Ch. 735; but see 5 App. Cas. 950, *per* Lord Blackburn.

(*m*) See *Andrews v. Mockford* [1896], 1 Q. B. 372; *Perk v. Gurney*, *ubi supra*; and the note to *Chandeler v. Lopus*, 1 Sm. L. C.; compare *Cann v. Wilson*, 39 Ch. D. 39.

(*n*) See *Angus v. Clifford* [1891], 2 Ch. 449; *Pulford v. Richards*, 17 Beav. 87; and cases of that class, noticed *infra*; *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520; *Smith v. Chadwick*, 9 App. Cas. 187, and 20 Ch. D. 27, as to several of the grounds relied on.

(*o*) 10 Eq. 73.

(*p*) See *infra*.

(*q*) 9 App. Cas. 187, and 20 Ch. D. 27.

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per annum." This was true in one sense but not in another ; and the plaintiff would not say in which sense he understood it—in truth he evaded that question. The action was for damages, and it failed. If the action had been for rescission of contract the result would probably have been the same, for the plaintiff would have still failed to prove that he had been misled by the statement (r).

False statement
not the sole
inducement to
take shares.

It is not, however, necessary for the person who seeks redress on the ground that he has been induced to take shares by a prospectus containing false statements to prove that such statements were the sole inducement which led him to apply for shares, or to explain upon which particular false statement he relied ; it is sufficient for him to prove that the mis-statements materially tended to induce him to do so (s) ; and if the mis-statements are clearly of such a character as would induce or tend to induce a person to apply for shares, and he proves that he did apply for shares on the faith of the prospectus as a whole, the inference of fact, in the absence of evidence to the contrary, will be that the mis-statements induced him to do so (t). In *Edgington v. Fitzmaurice* (u) a person relied on a mis-statement in the prospectus, but he was also influenced by a mistake of his own ; he was nevertheless held entitled to redress.

Edgington v.
Fitzmaurice.

Opportunity of
ascertaining the
truth not
material.

A person who makes a statement to another in order to induce him to act upon it cannot complain if the statement is believed without further inquiry. The person making the statement may guard himself by saying that it must not be taken as true without inquiry ; he may refer to others, or to books or documents, and leave the person with whom he is dealing to act on his own judgment (x). But unless this is done, the person to whom the statement is made is entitled

(r) Lord Bramwell thought this was proved, but that there was no fraud on the part of the defendant.

(s) *Peek v. Derry*, 37 Ch. D. 541 ; reversed on another point on appeal *sub nom. Derry v. Peek*, 14 App. Cas. 337 ; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. (Sc.), pp. 158 & 162 ; *Nicol's case*, 3 De G. & J. 387 ; *Clarke v. Dickson*, 6 C. B.

N. S. 453 ; *Cleveland Iron Co. v. Stevenson*, 4 Fos. & Fin. 437.

(t) *Aaron's Reefs v. Twiss* [1896], A. C. 273 ; *Arnison v. Smith*, 41 Ch. D. 348 ; *Smith v. Chadwick*, 20 Ch. D. 27, p. 44.

(u) 29 Ch. D. 459, an action for damages.

(x) As in *Jennings v. Broughton*, 17 Beav. 234 ; and 5 De G. M. &

to believe it and act upon it; and if it is false he is entitled to redress, although he might have found out the truth without much trouble or expense (y). Bk. I. Chap. 3.
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Unless all the above-mentioned requisites are established, a person who complains that he has been induced to take shares in a company by misrepresentation is without redress of any kind. But if he can establish them he will be entitled to redress of some sort either against the company or against the persons who made the misrepresentations, or against both them and the company, as the case may be, and as will be now explained. Remedies.

Redress against the company and against the persons who made the representations may be obtained in the same action (z), and all persons who have applied for shares on the faith of the same prospectus may be co-plaintiffs, though each must prove his own case (a). Form of action.

If a person seeks redress against the company he must show either (1) that the mis-statements are imputable to the company in that they were made either by the directors or the general agents of the company entitled to act and acting on its behalf (b), or by a special agent of the company acting within the scope of his authority, whether derived from previous authorisation or subsequent ratification, or (2) that the company was affected with knowledge before the contract was complete, either that the application was induced by misrepresentation or that it was made on the basis of representations (whereof the particulars may or may not have been known to the company) some of which were in fact material and untrue (c). If he shows this and has obtained his shares directly from the company, he can rescind his contract and repudiate his shares, (a) To rescind
the contract.

G. 126; *Attwood v. Small*, 6 Cl. & F. 232; and see *Redgrave v. Hurd*, 20 Ch. D. 1.

(y) See *Aaron Reefs Co. v. Twiss* [1896], A. C. 273; *Peck v. Derry*, 37 Ch. D. 541; reversed on other grounds on appeal *sub nom. Derry v. Peck*, 14 App. Cas. 337; *Rawlins v. Wickham*, 3 De G. & J. 304, and 1 Giff. 355.

(z) *Frankenburg v. Great Horseless Carriage Co.* [1900], 1 Q. B.

504, distinguishing *Gower v. Coultidge* [1898], 1 Q. B. 348.

(a) *Arnison v. Smith*, 41 Ch. D. 348, in which there were fifty-four plaintiffs; *Drineqbierv. Wood* [1899], 1 Ch. 393.

(b) See as to this, *infra*, Bk. II.; *Nicol's case*, 3 De G. & J. 387; *Mixer's case*, 4 ib. 575, noticed *infra*.

(c) *Lynde v. Anglo-Italian Hemp Spinning Co.* [1896], 1 Ch. 178; *Karberg's case* [1892], 3 Ch. 1.

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and obtain back from the company whatever money he may have paid to the company in respect of them (*d*) with interest at 4 per cent. (*e*), and further compel the company to indemnify him against loss (*f*).

Moreover, to entitle him to this relief, it is not necessary to prove that the statements were false to the knowledge of those who made them (*g*).

Loss of right to
rescind.

With respect, however, to the repudiation of shares on the ground of misrepresentation, two points must be borne in mind, viz.: (1.) The right to repudiate will be lost if not promptly asserted after the facts are known, or might have been known, if reasonable diligence had been exercised (*h*); and *a fortiori* will be lost if the shareholder has so acted after he knew the facts as to have elected to keep the shares, and to have waived his right to repudiate them. (2.) The right to repudiate by any registered shareholder in a company being wound up, cannot be exercised after the commencement of the winding up of the company (*i*). This last doctrine, which will be more fully discussed hereafter in connection with contributories, turns on the provisions of the Companies Act, 1862; and the cases under the older winding-up Acts in which shares were repudiated after the commencement of winding-up proceedings, although valuable as illustrations of principles, are no longer authorities on the right to repudiate after winding up has commenced.

(b) To recover
damages.

If the person defrauded cannot prove all that is necessary to repudiate his shares, or if he has lost his right to repudiate them, he may still be entitled to damages against those who issued the prospectus. But apart from statute, in order to entitle him to this relief he must prove fraud; an action for

(*d*) *Kisch v. Central Rail. Co. of Venezuela*, 3 De G. J. & Sm. 122, and L. R. 2 H. L. 99, and others of that class referred to below.

(*e*) *Karberg's case* [1892], 3 Ch. 1.

(*f*) See *Newbigging v. Adam*, 34 Ch. D. 582, and 13 App. Ca. 308.

(*g*) *Smith v. Reese River Co.*, L. R. 4 H. L. 64, 2 Ch. 604, and 2 Eq. 264; *Arkwright v. Newbold*, 17 Ch.

D. 301; *Redgrave v. Hurd*, 20 Ch. D. 1. See Pollock on Contracts, cc. 9 and 10.

(*h*) *Aaron's Reefs v. Twiss* [1896], A. C. 294; *Sheffield's case*, Johns. 451, and others of that class noticed *infra*.

(*i*) *Oakes v. Turquand*, L. R. 2 H. L. 325; *Kent v. Freehold Land, &c. Co.*, 3 Ch. 493, and 4 Eq. 588.

damages will not lie for a negligent as distinguished from a fraudulent misrepresentation in a prospectus. This was finally established by the decision of the House of Lords in the celebrated case of *Derry v. Peek* (k). In that case the House of Lords decided that an action for damages will not lie against a person for an untrue statement made by him unless he is guilty of fraud (kk); that he is guilty of fraud if he makes a statement knowing it to be untrue or without believing it to be true, or recklessly without caring whether it be true or not, but that he is not guilty of fraud if he honestly believes the statement to be substantially true, though he may have no reasonable grounds for his belief, and may have been guilty of carelessness in making the statement. The absence of reasonable grounds for his belief, and his carelessness in making the statement, are merely evidence, but not necessarily conclusive evidence, of the absence of any real belief of the truth of the statement, and the consequent presence of fraud. Moreover, it is not necessary in order to escape liability to have an active and positive belief in the truth of the statement; the person making the statement may know it to be untrue, yet if he made it merely through carelessness or inadvertence, his mind not being directed to the point, he is not guilty of fraud, and consequently is not liable in an action of deceit (l).

The principles on which *Derry v. Peek* was decided have an important bearing on the liability in damages of persons who use ambiguous language. In several cases decided before *Derry v. Peek* it was said that if a man uses language which, taken in its natural sense, conveys a meaning which he knows to be false, he cannot be held to say that he did not intend to deceive (m). Now, however, it is apprehended that a man

Ambiguous
statements.

(k) 14 App. Cas. 337, overruling *Peek v. Derry*, 37 Ch. D. 541; *Glazier v. Rolls*, 42 Ch. D. 436; *Angus v. Clifford* [1891], 2 Ch. 449. These and other cases are referred to below.

(kk) Cases in which the person making the statement owes a legal duty to the person to whom it is made to take proper care that the statement is true, are outside the

scope of this decision. See *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. p. 436.

(l) *Angus v. Clifford* [1891], 2 Ch. 449, p. 466.

(m) *Arnison v. Smith*, 41 Ch. D. 367, pp. 359, 371; *Smith v. Chadwick*, 20 Ch. D. 27, and 9 App. Cas. 187; and by the Court of Appeal in *Peek v. Derry*, 37 Ch. D. 541.

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will not be liable in an action of deceit if he honestly believes the words he uses to be true in the sense which he honestly attaches to them, unless he is conscious that they will be understood in a sense which is not true. The unreasonableness of the interpretation put upon the language by the person using it, would, it is conceived, be only evidence, though possibly in an extreme case convincing evidence of his dishonesty (u).

(c) Rescission
and damages.

The person aggrieved may both repudiate his shares and obtain damages, if he can prove what is necessary to entitle him to this double relief, and may obtain both forms of relief in the same action (o).

Recovery of
damages against
the company

With respect to these actions for damages against companies as distinguished from actions for rescission of contract and indemnity and actions under the Directors Liability Act, 1890, there is always the difficulty of establishing fraud against the company as a body. Many eminent men consider that on principle a corporate body cannot commit a fraud, and that consequently an action for fraud can never be maintained against an incorporated company; but the current of authority, and in the author's opinion sound principle also, are opposed to this view, and are in favour of such actions being maintainable. This difficult subject will be discussed hereafter (Book II., c. 3, § 3).

It is however settled that a shareholder who has been induced by fraud to take shares in a company cannot maintain an action (or its equivalent, viz., a claim) for damages against the company when it is being wound up (p). This doctrine is based upon the winding-up provisions of the Companies Act, 1862, and upon the rights of creditors under winding-up proceedings, and has no application to actions against companies not being wound up, nor to actions against individual directors or other persons.

Having now stated the general principles applicable to the subject under consideration, it will be useful to notice some of

(u) *Glasier v. Rolls*, 42 Ch. D. 436; *Angus v. Clifford* [1891], 2 Ch. D. 449, p. 472; and see *Greenwood v. Leathershod Wheel Co.* [1900], 1 Ch., p. 434.

(o) See *supra*, p. 91.

(p) *Houldsworth v. City of Glasgow*

Bank, L. R. 5 App. Cas. 317. See also *Cargill v. Bower*, 10 Ch. D. 302. Observe that these are cases of defrauded members. Claims for frauds on other persons are not affected by these decisions.

the more important decisions illustrating, (1) The right to relief against the company by way of rescission of contract and indemnity; and (2) The right of redress against the individuals who have been guilty of fraud.

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2. *Remedy against the Company.*

In *Karberg's case* (q) B. had signed a printed form issued by the promoters of an intended company expressing his willingness to become a member of the council of administration of the intended company. M. had not agreed to become a member of the council, but had expressed his willingness to help the company in any way he could. The promoters subsequently issued a prospectus inviting applications for shares in the intended company, stating that there would be a council of administration of members of the association, and giving a list of the names of the council, which included the names of B. and M. K. applied for shares in the proposed company on the faith of the prospectus, and paid a deposit. The application was on a form issued by the promoters, but did not refer to the prospectus. Soon afterwards the company was registered, and the subscribers of the memorandum of association, acting under the articles as directors, held a meeting at which the shares applied for by K. were allotted to him, and a prospectus substantially the same as that issued by the promoters was approved and ordered to be issued. K. paid the moneys due on allotment. Neither B. nor M. ever became members of the council or of the association. M. had refused before K.'s application, but there was no proof that this was known to the directors when the allotment to K. was made; B. refused shortly after that allotment. K. did not discover the misrepresentations for over four months, when he applied to have the contract rescinded and his name removed from the list of shareholders. The Court of Appeal held (1) that the statement in the prospectus meant that B. and M. had consented to become members of the council of administration, and had authorised the publication of their names as members of the council, and that the statement in

The Metropolitan Coal Consumers' Association.
Karberg's case.

(q) [1892], 3 Ch. 1. See, too, 39, and 63 L. T. (N.S.) 429, another *Wainwright's case*, 62 L. T. (N.S.) case relating to the same company.

Bk. I. Chap. 3. this sense was false; (2) that the mis-statement was material (r);
Sect. 1. (8) that though the prospectus upon which K.'s application

was made was issued before the company was in existence, so that the mis-statements were not made by the company or its agents, the application could not be dissevered from the prospectus, and that as in an action for rescission it is not necessary to prove that the defendant knew the statements to be false, the contract was voidable (rr); (4) that K., under the circumstances, had not lost his right to repudiate the shares by laches or delay; and lastly, (5), that as on the rescission of the contract the parties ought to be restored as far as possible to their original position K. was entitled to recover not only the moneys he had paid for the shares, but also interest thereon at the rate of 4 per cent. per annum from the dates of payment.

With reference to this case, it is to be observed that the judgments of the Court contain no finding that the directors, when making the allotment to K., knew that his application was based upon the prospectus issued by the promoters. It is, however, apprehended that such knowledge is essential to the decision (s), and was tacitly assumed by the Court. This is the view taken by Romer, J., in the later case of *Lynde v. Anglo-Italian Hemp Spinning Co.* (t). In that case the plaintiff sought to rescind his contract to take shares, on the ground of misrepresentations made to him by W., one of the promoters of the company. Romer, J., dismissed the action, on the ground that W. was not a director or general agent of the company, and had no authority to make any representations or otherwise act on its behalf in procuring applications for shares, and distinguished the case from *Karberg's case*, on the ground that in the case before him the directors had no knowledge that the plaintiffs' application was based on representations made by W.

Lynde v. Anglo-
Italian Hemp
Spinning Co

Kisch v. Central
Railway Com-
pany of Vene-
zuela.

In *Kisch v. Central Railway Company of Venezuela* (u), the

(r) That the names of directors may or may not be material, see remarks of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D., p. 50, and cases cited *supra*, p. 24.

(rr) In *Wainwright's case*, *ubi supra*, Wainwright had applied for shares on the faith of the prospectus

issued by the directors after the formation of the company.

(s) That is, if it be based on misrepresentation, *semble*, it might be supported on the ground of departure from the prospectus. See *ante*, p. 24.

(t) [1896], 1 Ch. 178.

(u) 3 De G. J. & Sm. 122; *aff.*

prospectus in effect stated—(1) That the company had obtained a concession from a foreign government; (2) That the contractor had guaranteed a dividend of two-and-a-half per cent. on the paid-up capital during the construction of the works; and (3) That the foreign government had guaranteed a dividend of nine per cent. on the paid-up capital for twenty years. The real facts were (1) That the company had for a large sum bought a concession made to another company; (2) The contractor's guarantee was limited to 20,000*l.*, the capital of the company being 500,000*l.*; (3) The government guarantee only came into operation in the event of the company failing, without any default of its own, to realise a profit of nine per cent. on its paid-up capital from its business. The memorandum of association empowered the company to purchase concessions, and the agreement for the purchase of the concession already obtained by others was referred to in the company's articles, but was not disclosed in them. The Court held that the misrepresentations in the prospectus were such as to entitle a person taking shares on the faith of it to rescind his contract, although he was not entitled to rely upon his own ignorance of the memorandum and articles of association, and of what was there disclosed.

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In *Smith v. Reese River Company* (x), the prospectus described some silver mines abroad which the company had contracted for, and proposed to work, as extremely valuable, whereas in fact they were wholly worthless, and were afterwards given up by the company for others, which were more promising. The directors who issued the prospectus did not know that the mines referred to in the prospectus were worthless, they having themselves been duped; but the Court held that a person who had taken shares on the faith of the prospectus was entitled to rescind his contract, and to have the company restrained from suing him for calls (y).

Smith v. Reese
River Company.

In *Ross v. Estates Investment Company* (z), a prospectus

Ross v. Estates
Investment
Company.

L. R. 2 H. L. 99, under the name
*Directors of Central Rail. Co. of
Venezuela v. Kisch.*

(x) L. R. 4 H. L. 64, 2 Ch. 604,
and 2 Eq. 264.

L.C.

(y) See, as to the immateriality
of knowledge on the part of the
directors that their statements were
false, *ante*, p. 92.

(z) L. R. 3 Eq. 122, aff. 3 Ch. 683.

Bk. I. Chap. 3. was issued by the directors of a company after its formation,
Sect. 1. and the prospectus stated, falsely, that half the first issue of shares had been already subscribed for, and that the company had contracted for the purchase of two properties, on one of which the vendor had already spent 70,000*l.* A person who had been induced to take shares in the company on the faith of this prospectus, was held entitled to rescind his contract, to recover from the company the money he had paid to it for the shares, to have his name removed from the register of shareholders, and to have the company restrained from suing him for calls.

Henderson v.
Lacon.

In *Henderson v. Lacon* (a), the prospectus stated, falsely, that the directors and their friends had subscribed a large portion of the capital; and a shareholder who had applied for and obtained shares on the faith of this prospectus was held entitled to repudiate his shares and to have his money back, and to have his name removed from the register of members, and to be indemnified by the directors.

Moreover, in such cases as these, the plaintiff is entitled to relief, although a petition to wind up the company may be presented after action brought (b), and he will not necessarily lose his rights by opposing the petition in the character of a contributory (c).

Misrepresentation not material or not relied upon.

These cases may be conveniently contrasted with the following, in which the misrepresentation relied upon was held not to be sufficiently material, or not to have been relied upon by the plaintiff so as to entitle him to relief.

Private arrangements by promoters.

Pulsford v.
Richards.

In *Pulsford v. Richards* (d), the projectors of a Belgian railway issued a prospectus for the formation of a company, stating that they transferred to the company the concession obtained from the Belgian government, and all the benefits arising from it, subject to certain specified reservations in favour of the promoters for reimbursement of preliminary

(a) 5 Eq. 249. See, too, *Arnison v. Smith*, 41 Ch. D. 348, an action of deceit.

(b) *Smith v. Reese River Co.*, and *Henderson v. Lacon*, *ubi supra*.

(c) *Tomlin's case* [1898], 1 Ch.

104.

(d) 17 Beav. 87. See, also, *Heymann v. European Central Rail. Co.*, 7 Eq. 154; *Kennedy v. Panama, &c., Mail. Co.*, L. R. 2 Q. B. 580.

expenses. The plaintiff, acting on the faith of this prospectus, applied for and accepted shares in the company, but afterwards filed a bill against the projectors for a return of all monies paid by him in respect of such shares with interest, offering to return the shares and all dividends received on account of them. The grounds on which the plaintiff sought to rescind his contract were substantially—(1) that an arrangement had been made by the promoters with an engineer, highly beneficial to him and detrimental to the company, and that this arrangement was in no way alluded to in the prospectus; and, (2) that the promoters had appropriated to themselves 20,000 shares in the company, in addition to the benefits expressly reserved to them in the prospectus. The Court, however, held that there was no such fraud as was sufficient to enable the plaintiff to rescind the contract into which he had entered, and his bill was dismissed with costs. As regards the shares, the Court was of opinion that the directors took the shares *bonâ fide*, and that the number of shares allotted by them to themselves and the engineer, was not a fact so material, that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion as to the probable success of the undertaking in which they were invited to take a part. As to the concealed arrangement with the engineer, the Court came to the conclusion that the services performed and to be performed by him, must have been performed by some one; that he was peculiarly well fitted to perform them; that supposing the remuneration agreed upon to have been excessive, still that would only entitle the shareholders to have the amount of excess paid by the directors themselves, and that the non-disclosure to the public of the agreement made with the engineer, was not the suppression of a fact which affected the intrinsic value of the undertaking, or consequently afforded a sufficient ground for a rescission by the plaintiff of his contract to take shares in the company.

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Pulford v. Richards.

In *Jennings v. Broughton (e)*, the plaintiff, who had taken (e) 17 Beav. 234, and 5 De G. M. & G. 126. See, also, *Attwood v. Small*, 6 Cl. & Fin. 232, where the plaintiff also relied on his own judgment.

Statements not
relied on by
plaintiff.
Jennings v. Broughton.

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shares in a mining company formed by the defendants, sought to rescind the contract on the ground that he had been induced so to do, by their representations. The misrepresentations consisted of exaggerated statements, as to the value and prospects of the mine, contained in the report of an engineer employed by the defendants, which report was submitted by them to the plaintiff. The plaintiff, however, did not altogether rely on this report, but went and examined the mine himself more than once, before he purchased the shares in it. The mine had undoubtedly been described in too glowing colours, and it by no means came up to the expectations formed of it; but the Court was of opinion, upon the evidence, that the plaintiff had not relied on what was represented to be actually existing, that he not only had had the same means as the defendants of ascertaining the truth, but that he had availed himself of those means, and that his deception was as much owing to his own error of judgment as to anything else. His bill therefore was dismissed, and with costs, and an appeal by him was also dismissed.

Prospectus not
relied upon by
plaintiff.
Robson v.
Devon.

In *Robson v. The Earl of Devon* (*f*), the plaintiff, a stock-broker, was induced by the secretary of a company, first to advance him 500*l.* on the security of 1,000 *l.* shares, on each of which *l.* was certified to have been paid up; and secondly, to purchase 1,200 other shares. On the failure of the company, the plaintiff sought to have both transactions declared void, and to obtain back from the company his 500*l.*, and the money paid for the purchased shares. The plaintiff rested his case against the company upon the following, amongst other grounds, viz.: First, that the company's prospectus showed that no shares ought to have been issued before a certain amount of capital had been subscribed; and secondly, that nothing had ever been paid in respect of the shares on which the 500*l.* had been advanced. But it was held that the plaintiff was entitled to no relief on either of these grounds. For, first, it was by no means clear that the capital required by the prospectus to be subscribed, had not in fact been subscribed; secondly, the plaintiff had not parted with his

(*f*) 3 Jur. N. S. 567, and 4 ib. 245.

money on the faith of the prospectus, so that it was immaterial to consider what was there stated; and thirdly, the shares on the security of which he lent his money were, as between the holder and the company, to be taken as paid-up shares, and therefore it was of no consequence to the plaintiff, whether anything had actually been paid upon them or not.

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Although the cases under the older winding-up Acts, in which persons induced by fraud to take shares in a company were held not to be contributories, can no longer be relied upon where the point for determination is contributory or non-contributory, those cases throw great light on the questions discussed in this chapter, and the following notice of them may still prove useful.

1. *Persons held entitled to repudiate their shares, having been induced to take them by the fraud of the company.*

Ginger's case (g) is an important Irish case, decided in winding up the Tipperary Bank. In that case the managing director of the bank, acting without authority, and in violation of the bank's deed of settlement, issued a number of shares, entered them in the share register book in the name of A., and debited him with their price. Of this proceeding A. was ignorant. In order to induce persons to take these shares, the director issued a flourishing report, prospectus, and balance-sheet, in which there was not a word of truth; he placed these documents in the hands of a friend, who did not know them to be false, and induced him to endeavour to sell the shares. The friend in question employed agents equally innocent with himself, to induce people to take shares, and such agents were furnished with the false and fraudulent documents above alluded to. Ginger was induced by one of these agents, and by the false documents produced by him, to purchase shares; and A. was induced by a trick on the part of the director to sign transfers to Ginger, who accepted the shares, and was registered as a shareholder in respect of them. Ginger was held not to be a contributory; first, because the shares transferred to him ought never to have been issued or transferred to him at all (h), and secondly, because he was induced to purchase them by a gross fraud, imputable to the company. Upon the question of fraud it was considered, that if shareholders choose to adopt, and seek to enforce the contract of a director, and say that he was their authorised agent to enter into it, they

(g) 5 Ir. Ch. Rep. 174.

(h) But see, as to this, *Richmond's case* and *Painter's case*, 4 K. & J. 305, where a person who had taken

shares issued without authority and fraudulently, was held a contributory.

Bk. I. Chap. 3. cannot repudiate the frauds of the agent which led to the contract, and
Sect. 1. which are immediately connected with, and the foundation of, the very transaction which is sought to be enforced.

Brockwell's
case.

Brockwell's case (i), which arose in the course of winding up the Royal British Bank, was substantially as follows: The bank was formed in 1849 under 7 & 8 Vict. c. 113. Annual reports were made by the directors to the shareholders, and such reports were from the very first false, to the knowledge of most, if not of all, of the directors. In December, 1854, the company was hopelessly insolvent, and the directors knew it. They nevertheless prepared a report, and laid it before a general meeting of shareholders, held in February, 1855, and in such report represented the company to be in a flourishing condition. In this same month the directors, by false representations as to the state of the company, induced the Board of Trade to grant the company a supplemental charter, and to authorise the increase of its capital by the issue of new shares. The report made to the shareholders in February, 1855, was advertised in the newspapers, and was to be seen at the company's office, and there Mr. Brockwell saw it. Upon the faith of this report he took shares in the company from the company itself; he paid up his capital and received dividends. In September, 1855, the company was ordered to be wound up. The frauds committed by the directors, and the falsity of their reports and representations, were then discovered. It was admitted that Brockwell would have been a contributory had there been no fraud; but it was contended on his behalf, and held, that he had been induced to take shares in and from the company by the fraud of the company, and that he was therefore not a contributory, and his name was struck off the list, with costs to be paid by the company.

Observations on
these cases.

These cases are frequently regarded as inconsistent with, and in effect overruled by *Nicol's case* (k), indeed the V.-C. Kindersley, who decided *Brockwell's case*, appears himself to have regarded it as overruled (l). But all that *Nicol's case* decided was, that a company could not be affected by the use one of its directors might make of a report which had been laid before, and adopted by a meeting of shareholders (m). In so far as *Ginger's case* and *Brockwell's case* are opposed to this decision, they may be considered as overruled by it; but the broad principles on which they proceeded may, it is conceived, still be relied upon, and have been recognised and acted upon in other cases.

Bell's case.

Bell's case (n). In this case the secretary of a company had, by the authority of its directors, issued circulars in which the affairs of the company were falsely and fraudulently represented to be in a flourishing state. Such circulars were issued for the purpose of inducing the public to take shares. Mr. Bell took shares on the faith of the statements contained in the circulars. He obtained such shares directly from the company, which was shortly afterwards ordered to be wound up. The fraud

(i) 4 Drew. 205.

415, *infra*.

(k) 3 De G. & J. 387, *infra*. See,
also, *Mixer's case*, 4 ib. 575.

(m) *Infra*.

(n) 22 Beav. 35.

(l) *Barrett's case*, 2 Dr. & Sm.

which had been committed was then discovered, and Mr. Bell repudiated his shares. He was held not to be a contributory, although he had executed the company's deed. Bk. I. Chap. 8.
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Ayre's case (o). In this case *The Deposit and General Life Assurance Company* was desirous, in March, 1854, of issuing new shares. The company had a manager in London and an agent in Bristol. The Bristol agent applied to Mr. Ayre to take shares, and produced to him the company's deed of settlement, also a list of the original shareholders, who were described as holding 10,550 shares, and as being persons of considerable property, and also a report made by the directors of the company, and representing the affairs of the company to be in a flourishing state. This report was false. The list of shareholders also contained many material false statements. The documents shown to Mr. Ayre had been sent from London for the express purpose of being laid before him; and on the faith of those documents, and of the statements made to him both by the company's London manager and by its Bristol agent, Mr. Ayre was induced to take 200 of the new shares, and to sign the company's deed in respect thereof. He afterwards, however, had reason to suspect that he had been imposed upon, and he then repudiated his shares and refused to pay a call made upon him. He further defended an action brought against him for such call, pleading fraud as a defence to the action; at the trial, however, the evidence adduced by him to prove the fraud was not satisfactory, and the company obtained a verdict, and he was compelled to pay the amount of the call, together with interest and costs. On the subsequent winding up of the company he succeeded in establishing the facts already mentioned, and it was accordingly held that he was not a contributory, and that the verdict of the jury was not conclusive upon the question of fraud. The judgment on this question deserves attentive perusal, and is an authority for the proposition that companies cannot be heard to say they did not know that their own reports were untrue.

Blake's case (p). There the secretary of the company sent to its brokers prospectuses of the company for distribution. The prospectus represented that several persons were directors of the company. The brokers were informed by the secretary that the shares taken by the directors and others exceeded the number set apart for persons in London and the neighbourhood, and that the London share list was closed; but that shares might still be had by persons residing in the country, and applying through country brokers. Advertisements to this effect were also published in the newspapers. This information was conveyed by the brokers to Blake, to whom they sent a prospectus. He bought some shares in the company on the faith of the above statements; but his suspicions being aroused by the low numbers on the scrip certificates sent to him, he made inquiries, and discovered that the London share list was still open, and that there was no difficulty in obtaining shares in London, and that three out of the eleven directors named in the prospectus had no shares in the company. Blake immediately repudiated his shares, and demanded back the money he had paid for his shares; and it was returned to him,

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and a line was drawn through his name on the register. Two calls were afterwards made, but he was not required to pay either of them. On the subsequent winding up of the company, he was held not a contributory. The decision proceeded on the ground—1, that Blake had been induced by fraud to apply for shares, and that such fraud affected the company; and 2ndly, that he had repudiated the shares as soon as he had discovered the fraud, and such repudiation had been acquiesced in by the company.

2. *Persons held not entitled to repudiate their shares.*

a) Fraud not imputable to the company.

Fraudulent
reports.

Even where a person has taken shares in a company on the faith of a false and fraudulent report of the directors of the company, he will nevertheless be unable to repudiate his shares if such report was not issued or published by the directors, or by their authority, in order to induce persons to take shares in the company. The unauthorised production of such a report to a person in order to induce him to take shares in the company, is not such a use of the report by the company as to render the company guilty of a fraud upon him, even although the report may have been produced to him by a director or some officer of the company.

The leading authority on this head is *Nicol's case*, which may be regarded as an appeal from the decision in *Brockwell's case* (q).

Nicol's case.

In *Nicol's case* (r), Nicol had taken shares in the Royal British Bank, in March, 1855, on the faith of the same reports as had induced Brockwell to take his. Brockwell had seen the reports at the bank. Nicol was shown them by a director, who made additional statements as to the flourishing condition of the bank. The Vice-Chancellor held Nicol not to be a contributory, he having been induced, by the fraud of the company, to take the shares in question. The Lord Chancellor dissented from this view, and expressed a strong opinion that companies are not responsible for the frauds of their directors; the Lord Justice Knight Bruce was not satisfied that the Vice-Chancellor's view of the case was correct; and the Lord Justice Turner, although differing in many respects from the Lord Chancellor, agreed with him in thinking that Nicol, having had no communication with the directors as a body, but having dealt with one of them only, was not in a position to say that he had been defrauded by the company. The whole Court, however, agreed that Nicol's name ought to be struck off the list of contributories, he having effected a valid transfer of his shares.

Holt's case.

Holt's case (s). The managing director of a company induced Holt to become a director, to take shares, and to sign the company's deed, by misinforming him as to the position and prospects of the company, and producing a flourishing but false prospectus. Holt was held a contributory.

Barrett's case.

Again, it was decided by the V.-C. Kindersley in *Barrett's case* (t), that

(q) 4 Drew. 205, *ante*, p. 102.

case, 5 Jur. N. S. 7, *infra*, p. 107.

(r) 3 De G. & J. 387. See, also,
Mixer's case, 4 ib. 575.

(t) 2 Dr. & Sm. 415, and 3 De G.
J. & Sm. 30.

(s) 22 Beav. 48. See, too, *Bigge's*

where directors made a false report to a meeting of shareholders, and the meeting adopted the report, and it was afterwards sent to each shareholder, no shareholder could treat that report as a fraud by the company on himself. Consequently a shareholder who, on the faith of such report, applied for and obtained more shares in the company, was held to be a contributory in respect of them.

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In the following cases, persons who had been induced to take shares in a company by the fraud of some individual connected with the company, were held not to be entitled to repudiate their shares. After what has preceded they will be found to offer little difficulty.

Bernard's case (u). *Bernard*, being desirous of purchasing shares in a company, applied to the manager for information as to its circumstances, and was told, amongst other things, that dividends were being paid. He took fifty shares, which were in fact, although he did not know it, issued by the directors. He received dividends for three years, and was held a contributory, although the company was insolvent when he took the shares.

Gibson's case (x). In this case *Gibson* had been induced by a promoter of a company to take shares in it, and to sign its deed of settlement in respect of such shares, upon the assurance of the promoter that two other persons would do the same. These two persons, however, refused to join the company, and *Gibson* then repudiated his shares. He was afterwards informed by the promoter, with whom he had dealt, that such shares had been transferred, which, however, was not true. *Gibson* was held to be a contributory. In this case there was in truth no fraud inducing him to take shares; for the persons who were stated to be willing to sign the deed and become directors were at the time believed to be willing to do so. Further, there was nothing to show that the promoter, with whom alone *Gibson* dealt, ever acted otherwise than in his individual capacity.

Woollaston's case (y). Dr. *Woollaston* was requested by one of the directors of an insurance company to become one of its medical referees, and was told that there would be only two. Dr. *Woollaston* applied for the appointment, and his application was accepted. The appointment appears to have been made without qualification, but to have been confirmed upon the condition that the appointee should sign the company's deed for 200 shares, and that the appointment should date from the day on which he signed it. The secretary of the company assured Dr. *Woollaston* that only two referees would be appointed; that every officer of the company had 200 shares in it; and that he must take a like number. On the faith of these representations Dr. *Woollaston* signed the deed for

(u) 5 De G. & S. 283. The fraud here consisted in the payment of dividends out of capital, rather than in the statement of the manager. The Court does not seem to have been satisfied that there was any *dolus dans locum contractui*.

(x) 2 De G. & J. 275. *Kemp's*

case, and *Hudson's case*, reported in the same place, are not distinguishable from *Gibson's*.

(y) 5 Jur. N. S. 617, affirmed on the point of fraud, 4 De G. & J. 437. On appeal, Dr. *Woollaston* was held not a contributory, his shares having been forfeited.

Bk. I. Chap. 3. 200 shares. He acted for the company for some little time, but having afterwards discovered that two other referees had been appointed, he tendered his resignation, and demanded back the money he had paid for his shares. This demand, however, was not complied with. The statement made by the secretary as to the number of shares held by the other officers of the company was false; but it was held that there was no such fraud as to relieve Dr. Woollaston from his liability to be a contributory.

Ex parte Worth. *Ex parte Worth* (z). In this case the shareholders of a company had resolved on issuing preference shares, which they had no right to do. A certain number were taken by a director, and he sold some of them to a lady, who accepted them, and signed the company's deed in respect of them. She was held to be a contributory, for there had been no dealing whatever between her and the company; she was not induced to take any shares by any representation made to her by the company, or made by the company to the public, and which she had a right to take advantage of as one of the public.

Frowd's case. *Frowd's case* (a) is another case of the same class. *Frowd* was induced to take shares by the representations of one of the company's clerks, and was held a contributory.

Sheffield's case. *Sheffield's case* (b) may be referred to as an authority, to the effect that a person who takes shares in a company, and signs its deed, is a contributory, although the effect of that deed may have been misrepresented to him by the officers of the company.

b) *Fraud by a person not a party to the contract.*

Case of person
buying shares
from a share-
holder.

Inasmuch as a contract between two persons cannot be rescinded by either on the ground that he was induced to enter into it by the fraudulent representations of a stranger, it follows that if a shareholder in a company sell his shares to a person who accepts them, and is accepted by the company as a shareholder in respect of them, the purchaser will be unable to repudiate his shares, although he may have been induced to buy them by false and fraudulent reports issued by the directors of the company (c). The fraud of the company is not imputable severally to each of the persons composing it; and the purchaser cannot, therefore, repudiate his shares on the ground that he was induced to take them by the fraud of the seller. This explains several cases in which purchasers of shares in companies paying large dividends when they were in fact insolvent, have, nevertheless, been held to be contributories (d).

(z) 4 Drew. 529; as to shares purchased from shareholders, and not obtained directly from the company, see below under sub-head b).

(a) 9 W. R. 328.

(b) Johns. 451, and *infra*. See, too, *Blackburn's case*, 8 De G. M. & G. 177; *Conybeare v. New Brunswick, &c., Co.*, 7 H. L. C. 711.

(c) *Duranty's case*, 26 Beav. 182; *Ex parte Worth*, 4 Drew. 529; *Sanderson's case*, 3 De G. & S. 66; *Ex parte Oakes and Peek*, 3 Eq. 576; and *Hyslop v. Morel Brothers, Cobbet & Son, Ltd.* [1891], W. N. 19, and see the next note.

(d) *Bigge's case*, 5 Jur. N. S. 7; *Burnes v. Pennell*, 2 H. L. C. 497.

c) *Fraud of the company not the cause of the contract.*Bk. I. Chap. 3.
Sect. 1.

Although fraudulent reports may have been issued and published by the directors of a company, no person can rely upon them as a ground for repudiating shares taken by him in it, unless he was induced to take the shares by such reports. *Bigge's case* (e) may be usefully referred to on this head. There a young man of the name of *Bigge*, having money and nothing to do, was induced by his uncle and friends to become a director of a company. He was told that to do so he must take a certain number of shares in it. His uncle was himself a director, and transferred to him the necessary number of shares. The company was paying dividends; it had issued reports which contained untrue representations of the state of its affairs; and it was, in fact, insolvent. But the shares were not taken on the faith of these reports, nor upon the faith of any representations attributable to the company, and *Bigge* was therefore held to be a contributory (f).

Case of person
not induced to
take shares by
the fraud in
question.
Bigge's case.

d) *Shares not repudiated when fraud was discovered.*

A person induced to take shares in a company by the fraud of the company, will be unable to repudiate them if, knowing or having the means of discovering the fraud, he nevertheless continues to hold his shares. A leading case on this head is *Sheffield's case* (g).

Effect of not re-
pudiating shares
on discovery of
fraud.

There a person had been induced to take shares in a company, on the assurance of its manager and its cashier that no risk would be incurred if he paid up his shares in full. He accordingly took shares, signed the company's deed, and paid up his shares in full. The deed, when he signed it, contained a clause limiting the liability of the shareholders to the amount of their unpaid-up capital. This clause had been fraudulently inserted in the deed, so as apparently to form part of it, and was fraudulently withdrawn from the deed before it was registered. He, however, never read the deed. The company carried on its business for several years, and the shareholder in question, who had never had his attention called to the difference between the deed as registered and the deed as signed by him, received dividends and attended meetings as a shareholder. After the lapse of more than four years, the company was ordered to be wound up, and it was then that the fraud above mentioned

Sheffield's case.

Bernard's case, 5 De G. & S. 283, is partly but not wholly explicable on this principle, for fifty of the shares in respect of which *Bernard* was a contributory, were issued by the directors.

(e) 5 Jur. N. S. 7. See, too, *Longworth's case*, 7 W. R. 483, where the shares were taken before the fraud was committed.

(f) See, too, *Sanderson's case*, 3

De G. & S. 67, and 3 H. L. C. 698, where the company accepted a purchaser of shares as a shareholder, although it was on the eve of bankruptcy.

(g) Johns. 451. See, too, *Mixer's case*, 4 De G. & J. 575; *Ex parte Briggs*, 1 Eq. 483; *Scholey v. Central Railway Co. of Venezuela*, 9 Eq. 266 n., and *Ashley's case*, ib. 263.

Bk. I. Chap. 3. Sect. 1. *Sheffield's case.* was discovered. The shareholder contended that he had never become a shareholder in the registered company; or that if he had, he had been induced to become so by the fraud of the company. But it was held that it was not open to him to say he did not know the contents of the registered deed; that other people were entitled to say they had acted on the faith of it; and that he could not escape from being made a contributory (*h*). The shareholder in this case was held liable, mainly upon the ground that he might have known, and, in fact, was bound to know, the contents of the registered deed. Treating him, therefore, as acquainted with those contents, although ignorant of the fraud which had been perpetrated, his acts amounted to an adoption of shares in the registered company. The only question which could then arise would be, whether he was entitled to be indemnified by the company against loss, he having been told by the manager and one of the directors, that he would not be liable beyond the extent of his paid-up capital. Such a statement as this, however, could not affect the company; for, so far as the statement was true, it added nothing to what might have been learnt from the deed itself; and so far as it was false, it was made by persons who certainly were not the agents of the company to explain the legal effect of its deed of settlement.

c) Effect of persons taking shares on faith of others being shareholders.

Effect of person taking shares on the faith that others are shareholders. If a shareholder has been induced to take shares in a company by the fraud of the company, and since he took such shares other persons have taken shares on the faith of his being a shareholder, there are three alternatives, viz., 1, to hold that he, and consequently they, are entitled to repudiate their respective shares; 2, to hold that they, and consequently he, must be treated as shareholders; 3, to distinguish between his case and theirs, and whilst holding him at liberty to repudiate, to hold them bound.

Richmond's case. Painter's case. Of these alternatives the last was adopted in *Richmond's case* and *Painter's case* (*i*). There persons had been induced to take shares in a company, the deed of settlement of which was materially altered after they had signed it. Other persons had taken shares in the same company, and had executed the deed in the state in which it ultimately remained, and whilst the persons first referred to were shareholders. The first set of shareholders were held not to be contributories; but the second set were held to be contributories, although it was contended on their behalf, that they had only agreed to join a company in which the first set were shareholders in reality as well as in appearance.

Upon this case it is to be observed that there was no evidence showing that in point of fact the second set of shareholders had been induced to

(*h*) Other persons who had signed the deed whilst the limited liability clause was part of it, were held not to be contributories; but the circumstances distinguishing their

cases from *Sheffield's* do not appear. See *Cox's case*, and *Naylor's case*, mentioned in 4 K. & J. 314.

(*i*) 4 K. & J. 305.

take shares in the belief that the first set were shareholders; for it does not appear that the shareholders held to be contributories, knew who, in particular, had signed the company's deed before they signed it themselves. If the facts had in this respect been different, *Sheffield's case* goes far to show that all the persons defrauded would have been contributories (k).

Such cases as those last adverted to must not be confounded with *Parbury's case* (l), in which it was held that a person induced to take shares in a company on the faith of its prospectus, which contained false and fraudulent statements, was nevertheless a contributory, inasmuch as it was reasonable to suppose that there were other persons, equally innocent with himself and with whom, therefore, he was liable to contribute. Now it is conceived that if these other persons had, like himself, been induced to take shares on the faith of the company's prospectus, the only consequence would be that they and he might all have repudiated their shares. If in such a case some of those deceived do not choose to exercise their right of repudiation, that ought not to prevent the others from so doing. If 100 persons have been equally cheated, and ninety-nine of them are content to abide by their bargain, that is no reason why the hundredth should be held to his (m). Moreover, under the older Winding-up Acts (under which *Parbury's case* was decided), persons entitled to be indemnified by the company ought not to be contributories, simply because they may possibly be called upon to bear debts or losses, for which the company, as between them and it, is primarily responsible. *Parbury's case*, therefore, cannot be considered satisfactory. But this conclusion does not render it more easy to deal with such cases as *Richmond's* and *Painter's case*; for, *ex hypothesi*, in them, those persons who are equally innocent are not in the same position relatively to each other; some of them having become shareholders in the belief that the others had become so first. It is the right of the former against the latter which it is so difficult to determine, and which cannot yet be considered as finally settled by decision.

3. Remedy against the individuals who made the statements.

Directors and others who publish false and fraudulent reports with a view to induce people to take shares incur serious criminal as well as civil responsibility. They are liable to be indicted and convicted for conspiracy at common law (n); if the statements are contained in any report, balance sheet, or other document required by the Companies Act, 1900, they are liable to punishment under § 28 of that Act (nn); and they are

(k) *Ante*, p. 107. Compare the judgments in *Gibson's case*, 2 De G. & J. 284; *Bell's case*, 22 Beav. 35; *Brockwell's case*, 4 Drew. 214.

(l) 3 De G. & S. 43.

(m) See 4 Drew. 214, in *Brock-*

well's case, and 3 De G. & J. 425, in *Nicol's case*.

(n) See below, and *Scott v. Brown, Doering, McNab & Co.* [1892], 2 Q. B. 724.

(nn) See also p. 126, *infra*.

Bk. I. Chap. 3. also liable to punishment under 24 & 25 Vict. c. 96, § 84, which
Sect. 1. will be found in the chapter relating to fraudulent accounts (o).

In the notorious case of the Royal British Bank, the directors were indicted and convicted of the common law offence of a conspiracy to induce persons to become shareholders in and customers of the bank by issuing false and fraudulent reports respecting its condition and solvency (p); and in the equally notorious case of the Eupion Fuel and Gas Company, the directors were indicted and convicted of a conspiracy to defraud by fraudulently obtaining a settling day from the Stock Exchange Committee, with intent to induce persons to deal in shares of the company in the belief that it was duly formed and constituted (q).

Civil liability. Directors and others who fraudulently circulate false prospectuses and reports, with a view to induce people to take shares, are answerable in damages to those who take shares on the faith of such reports (r); and an action for deceit is sustainable, although the prospectus or report relied on was not the sole inducement to the plaintiff to take shares (s); and although there may have been no immediate communication between the plaintiff and the defendant (t), and although the defendant may have been only a servant of the company (u). Such an action, moreover, is sustainable in Scotland (x), but not in England (y), against executors for the fraud of their testator.

(o) *Infra*, Bk. III. c. 3, § 4.

(p) *R. v. Esdaile*, 1 Fos. & Fin. 213. See, also, *per* Lord Campbell in *Burnes v. Pennell*, 2 H. L. C. 497, p. 525.

(q) *R. v. Aspinall*, 1 Q. B. D. 730, and 2 Q. B. D. 48. See, also, *R. v. Timothy*, 1 Fos. & Fin. 39, and *R. v. Gurney*, Finlaison's Report, and for obtaining money under false pretences, *R. v. Watson*, 4 Jur. N. S. 14; 24 & 25 Vict. c. 96.

(r) *Arnison v. Smith*, 41 Ch. D. 348; *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Gerhard v. Bates*, 2 E. & B. 476; *Burnes v. Pennell*, 2 H. L. C. 497. See, also, *Denton v.*

Great Northern Rail. Co., 5 E. & B. 860; *Williams v. Swansea Harbour Trustees*, 14 C. B. N. S. 845; *Jury v. Stoker*, 9 L. R., Ir. 385.

(s) See *ante*, p. 90.

(t) *Andrews v. Mockford* [1896], 1 Q. B. 373; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Bedford v. Bagshaw*, 4 H. & N. 538; *Bale v. Cleland*, 4 Fos. & Fin. 117. Compare *Peek v. Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79, noticed *infra*.

(u) *Cullen v. Thompson*, 4 McQu. 424.

(x) *Davidson v. Tullock*, 3 McQu. 783.

(y) *In re Duncan, Terry v. Sweeting* [1899], 1 Ch. 387; *Peek v.*

But a director is not liable for the frauds of his co-directors or of any other agent of the company, *e.g.*, for a fraudulent prospectus issued by them, unless he is himself guilty of fraud (z). Bk. I. Chap. 3.
Sect. 1.

Actions of this class are often brought on insufficient materials by shareholders whose expectations have been disappointed, and who seek without justice to throw the loss they have sustained on persons who are as innocent of fraud as themselves. But the law of this country is unquestionably very lenient to persons who act honestly, but who nevertheless put their names to statements on the faith of what they are told by others and the truth of which they too readily assume. Apart from statute and from cases in which the person making a statement is under a recognised legal obligation to take care that his statement is true, actions for damages for negligent as distinguished from fraudulent misrepresentations will not lie (a); and the fiction of an implied warranty, which has been had recourse to in order to make agents liable for honest mistakes as to their own authority (b), has not been applied to other honest mistakes, although they may have seriously misled and injured other people. Actions against directors and others have constantly failed by reason of the evidence of fraud not being sufficient (c).

The case which finally established the necessity of proving fraud to obtain damages for a misrepresentation in a prospectus is *Derry v. Peek* (d). There the prospectus of a tramway company stated that the company had a right by their special Act to use steam instead of horses. This was not true. The company were by their Act authorised to use steam if the Board of Trade consented, but not otherwise; and the Board would not consent

Gurney, L. R. 6 H. L. 377, and 13 Eq. 79; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, and 3 App. Ca. 1218.

(z) *Weir v. Bell*, 3 Ex. D. 238, noticed *infra*, and cases in next note.

(a) *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford* [1891], 2 Ch. 149; *Glasier v. Rolls*, 42 Ch. D. 436.

(b) *Firbank's executors v. Humphreys*, 18 Q. B. D. 54; *Chapleo v.*

Brunswick Building Society, 6 Q. B. D. 696; *Weeks v. Propert*, L. R. 8 C. P. 427; *Cherry v. Col. Bank of Australasia*, L. R. 3 P. C. 24.

(c) See *Ship v. Crosskill*, 10 Eq. 73, *ante*, p. 89; *Smith v. Chadwick*, L. R. 9 App. Ca. 187, and 20 Ch. D. 27; *Bellairs v. Tucker*, 13 Q. B. D. 562, and cases *infra*.

(d) 14 App. Cas. 337, reversing *Peek v. Derry*, 37 Ch. D. 541, and see *supra*, p. 93.

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to the use of steam except on a very small portion of the company's line. When the prospectus was issued, the directors believed that they would have no difficulty in procuring the necessary consent; but they had not applied for it, and they had no reasonable grounds for their belief. It was held by the Court of Appeal that notwithstanding their belief they were liable in damages to a person who had taken shares on the faith of the statement in the prospectus. This decision was reversed by the House of Lords, who held that an action for damages for misrepresentation is essentially an action of deceit, and that in such an action the plaintiff must prove fraud; that fraud is proved if it be shown that the person made the statement knowing it to be false or without believing it to be true or recklessly without caring whether it were true or false, that if a person honestly believes a statement to be substantially true he is not guilty of fraud, though he may have no reasonable grounds for his belief and may have been guilty of carelessness in making the statement, that the absence of reasonable grounds for belief and want of care are merely evidence of the absence of an honest belief in the truth of the statement, and the consequent presence of fraud; that though in the case under discussion the directors knew the statement was inaccurate they honestly believed it was substantially true, and that therefore they were not guilty of fraud and not liable in damages to persons who had been misled by the statement.

Angus v.
Clifford.

This case was followed by and discussed in *Angus v. Clifford* (c). There the prospectus stated that certain reports on mines purchased by the company had been "prepared for the directors." The reports had in fact been prepared on the instructions of the agents of the vendors and not of the directors. The directors knew this. At the trial the directors stated that though they had read the prospectus they did not attach any importance to the statement or carefully consider the meaning of the words used, and one of them said he read "prepared for" as equivalent to "adopted by," and did not think any one would be misled. Romer, J., held that the words were untrue in their ordinary and natural meaning, that the

(c) [1891] 2 Ch. 449. See, also, compare *Arnison v. Smith*, 41 *Glasier v. Rolfe*, 42 Ch. D. 436; and Ch. D. 348.

directors had not satisfactorily explained the meaning which they attached to the words, and that they were not justified in inserting the words in the prospectus, and consequently that they were liable in damages to a person who had taken shares on the faith of the prospectus. The Court of Appeal held that though the directors had been guilty of a want of caution in using the words, the findings of the Judge did not amount to a finding of fraud, for it was consistent with these findings that the directors had used the words honestly either through inadvertence or because they attached to them a sense in which they were true without it occurring to them that the words would be understood in another and more correct sense in which they were false; they therefore reversed the decision of Romer, J., but declined to give the directors their costs on account of the gross carelessness of which they had been guilty. It should be noticed in this case that there was no evidence that the reports themselves were false, and it seems very doubtful whether in the absence of such evidence the statement in question was material. Romer, J., held it was, but the Court of Appeal declined to express an opinion on this point.

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In *Weir v. Bell* (f) the directors of a company were authorised by a general meeting to raise money by debentures. The directors, including Bell, authorised the secretary to employ a firm of brokers to obtain subscriptions for the debentures. The brokers issued a prospectus which contained serious mis-statements of fact which were false to the knowledge of the brokers, and mentioning Bell and others as directors. The plaintiff subscribed for debentures on the faith of this prospectus, and, they proving worthless, sued Bell for damages. But there was no proof that Bell knew of or authorised these statements, and the jury found that he did not. It was therefore held that he was not liable. Cotton, L. J., dissented on the ground that it was Bell's duty as a director to know the contents of a prospectus issued by persons authorised by him to invite subscriptions for the company's debentures.

(f) 3 Ex. D. 32 & 238; *Cargill v. Bower*, 10 Ch. D. 502. Compare *Peek v. Gurney*, 13 Eq. 79, and L. R. 6 H. L. 377.
Glasier v. Rolls, 42 Ch. D. 436, and

L.C.

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Shares not pro-
cured from
company.

Peek v. Gurney.

Andrews v.
Mockford.

Fraudulent
concealment.

Correcting a
mis-statement.

In an action against directors for a fraudulent statement in a prospectus, it is always material to consider from whom the plaintiff acquired his shares and from whom he obtained the prospectus. The object of a prospectus is to induce persons to apply to the company for shares, and not to enable persons who have shares to sell them to other people. Accordingly it was decided by the House of Lords in *Peek v. Gurney* (g) that a person who had bought shares on the Stock Exchange on the faith of a prospectus which was materially misleading, could not maintain an action for damages against the directors without proof of some direct communication between them and him. If, however, the object of the prospectus is not only to induce the public to take shares from the company, but also to induce them to buy shares in the market, an action will lie against those who issued the prospectus at the instance of any person who has bought shares on the faith of it (h).

A fraudulent concealment of a material fact will not support an action for damages unless its effect is to make what is stated untrue. This doctrine was distinctly laid down by Lord Cairns in *Peek v. Gurney* (i), and has been often recognised since (k). There is no doubt, however, that the commission of frauds in the formation of companies is greatly facilitated by this limitation of the circumstances necessary to sustain such actions.

If directors fraudulently issue a false prospectus inviting subscriptions for shares or debentures in their company, and subsequently wish to correct the mis-statements in it, they must do so in plain and unambiguous language. A correction, however explicit, will not exonerate the directors from liability to persons who have previously taken shares on the faith of the original prospectus in respect of loss incurred before the correction is communicated to them; moreover, since persons who have been induced by fraud to enter into a contract may elect to abide by the contract and sue those guilty of the fraud for the loss thereby occasioned, it would seem that the directors, notwithstanding the correction, would be liable for loss

(g) L. R. 6 H. L. 377.

(h) *Andrews v. Mockford* [1896],
1 Q. B. 373.

(i) L. R. 6 H. L. 377; see *ante*,

p. 88.

(k) *Arkwright v. Newbold*, 17
Ch. D. 301.

subsequently resulting from the contract previously entered into. It has been decided that they will be so liable unless they inform those who have taken shares or debentures on the faith of the original prospectus not only of the true facts, but also of the fact that they have been misinformed, and that they are entitled to repudiate their shares or debentures, and to a return of all moneys paid in respect of them (*l*).

In an action for damages, lapse of time short of that prescribed by the Statute of Limitations affords no defence (*m*).

The measure of damages in these cases is the difference between the price paid by the plaintiff for his shares and their real value at the time; but if the plaintiff retains his shares the amount he may have to pay in respect of them in the future must be taken into account (*n*). Their market value may, however, be and practically always is dependent on the ignorance on the part of the public of the frauds complained of. In order to ascertain the real value of the shares subsequent events must be looked at; and if these show that the shares were really worthless, the whole of the money paid for them will be recoverable. The circumstance that the plaintiff might have sold his shares at a high price before the frauds were exposed does not diminish the damages to which he is entitled (*o*).

SECTION II.—STATUTORY ENACTMENTS.

1. *The Directors Liability Act, 1890.*

53 & 54 Vict. c. 64.

The Directors Liability Act, 1890, which will be found printed in the Appendix, was passed in consequence of the decision of the House of Lords in *Derry v. Peek* (*p*). The principle of this decision is applicable to all negligent

(*l*) *Arnison v. Smith*, 41 Ch. D. 348. In reading the judgments in this case it must be remembered that they were delivered before the decision of the House of Lords in *Derry v. Peek*.

(*m*) *Peek v. Gurney*, L. R. 6 H. L. 377; overruling on this point S. C. 13 Eq. 79.

(*n*) *Arnison v. Smith*, 41 Ch. D.

348. (*o*) *Peek v. Derry*, 37 Ch. D. 541; overruled on other grounds, *sub nom. Derry v. Peek*, 14 App. Cas. 337; *Twycross v. Grant*, 2 C. P. D. 469; *Davidson v. Tulloch*, 3 McQu. 790. See, also, *Arkwright v. Newbold*, 17 Ch. D. 301, *per Fry, J.*

(*p*) See *supra*, pp. 93 and 111.

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mis-statements, except when made by persons under a recognised legal obligation to take care to ascertain that what they say is true (*pp*), and not merely to those contained in a company's prospectus. The statute in question, however, does not deal with the principle of the decision, but excludes a limited class of cases from its operation. Like so many modern Acts of Parliament it is framed to meet a particular grievance, and does not replace an unsound doctrine, which leads to unfortunate results, by a sounder principle which would avoid them. Instead of altering the law relating to negligent statements generally, the Act deals only with such statements in a company's prospectus.

The Act may be divided into two parts, viz., the 3rd section, which deals with the liability of directors and others, who issue prospectuses containing untrue statements, towards third parties, and both extends that liability and renders its proof more easy; and §§ 4 and 5, which deal with the rights of such directors and other persons *inter se*, and give them, as some compensation for the increased liability thrown upon them by the 3rd section, certain rights of indemnity and contribution which they would not otherwise enjoy.

Application of
the Act.

Before considering the contents of these sections in detail, the 2nd section, which enacts that the Act shall be construed as one with the Companies Acts, 1862 to 1890, calls for remark. It gives rise to the important question whether the Act is limited to companies formed or registered under the Companies Acts, 1862 to 1890.

It is difficult to see what the section means if it does not confine the operation of the Act to those companies. On the other hand it is equally difficult to see any reason why directors of such companies should be exposed to greater liability than, or be in a different position from, directors of railway and other companies governed by the Companies Clauses Acts; but a precedent for such a distinction may be found in § 38 of Companies Act, 1867 (*q*). This limitation, if it exists, is the more remarkable as the mis-statement, which gave rise to the case of

(*pp*) See *Lagunas Nitrate Co. v. Co. v. Kelly*, 3 Times L. R. 634, a decision on § 25 of the Companies Act, 1862, and § 204 of that Act.

(*q*) See also *Christ Church Gas*

Derry v. Peek, was contained in a prospectus which related to a tramway company incorporated by a special Act and not governed by the Companies Act, 1862, and the Acts amending it (r). Bk. I. Chap. 3.
Sect. 2.

The most important alteration introduced by the Act is that in cases to which it applies an action in the nature of an action for damages for misrepresentation will lie against a person for an untrue statement although he is not guilty of fraud. The Act contains no mention of fraud, nor does it in any way refer to the honesty or dishonesty of the person making the untrue statement. Fraud need not
be proved.

The contents of the present Act and the alterations introduced by it into the existing law will, it is hoped, be apparent from the following examination of its provisions.

In order to give rise to an action under this Act for compensation for damage sustained by reason of an untrue statement, it is necessary— Liability for
untrue state-
ments.

1. That a prospectus or notice inviting persons to subscribe for shares, debentures, or debenture stock of a company shall have been issued since the commencement of the Act, *i.e.*, since 18th August, 1890.
2. That an untrue statement shall have been contained either
 - i) in the prospectus or notice, or
 - ii) in a report or memorandum
 - a) appearing on the face of the prospectus or notice, or
 - b) by reference incorporated therein, or
 - c) issued therewith.
3. That the person seeking redress shall have subscribed (s) for a share, debenture, or debenture stock on the faith of such prospectus or notice (t); and lastly,

(r) It may be noticed as perhaps throwing some light on this section that § 3(3) speaks of issuing debentures to obtain capital; such an expression is quite inappropriate to companies governed by the Companies Acts, 1862 to 1890, but not so much so to companies governed by the Companies Clauses Acts, for

the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), speaks of "loan capital."

(s) "Subscribe for," *i.e.*, apply for an allotment of shares, not purchase them from persons to whom they have already been issued. See *Peek v. Gurney*, L. R. 6 H. L. 377.

(t) As to this see *Greenwood v.*

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Sect. 2.4. That such person shall have sustained loss or damage
by reason of the untrue statement.What is an
untrue state-
ment.

In considering whether a statement is untrue regard must be had to the meaning which it conveys to those who read it, and not to the meaning attached to it by those who issue the prospectus (*u*). If it is misleading to those who read it, whether by suppression of material facts or otherwise, it is untrue (*x*).

Object of the
action.

The object of the action is to recover compensation for the loss or damage sustained by reason of the untrue statement (*y*).

Persons liable
under the Act.

The following persons (*z*) are *prima facie* liable to pay such compensation, namely, every person who

- 1) is a director of the company at the time of the issue of the prospectus or notice ;
- 2) having authorised such naming of him, is named in the prospectus or notice as
 - a) a director, or as
 - b) having agreed to become a director either immediately or after an interval of time ;
- 3) is a promoter of the company and has taken part in the preparation of the prospectus or notice or of the portion containing the untrue statement (*a*) ;
- 4) has authorised the issue of the prospectus or notice.

In an action under this Act unless the plaintiff has proved the defendant to be a member of one of the three first-mentioned classes of persons, he is under the same necessity

The Leather Shod Wheel Co. [1900],
1 Ch. 421, and *supra*, p. 90.

(*u*) *Greenwood v. Leather Shod
Wheel Co.* [1900], 1 Ch. 421.

(*x*) *Ib.* and *Dringbier v. Wood*
[1899], 1 Ch. 393.

(*y*) The measure of damages will
be the same as in an action of deceit.
See supra, p. 115.

(*z*) By the Interpretation Act,
1889, § 19, "person," unless a con-
trary intention appears, includes
any body of persons corporate or
unincorporate. *See, too, Hirst v.*

West Riding Union Bank Co. [1901],
2 K. B. 560. It seems, therefore,
that a promoting company may be
held liable under this section as
being within the 3rd or 4th class of
persons mentioned in the section.
The Act makes no mention of fraud,
and, therefore, the difficulty felt
in making a company liable for
damages in an action of deceit does
not arise.

(*a*) This does not include any
person by reason of his acting in a
professional capacity for persons

of proving that the defendant authorised the issue of the prospectus as in an action for deceit (*b*). Bk. I. Chap. 3.
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A plaintiff who has proved the four facts above-mentioned upon which an action under this section is based, the amount of his damage, and that the defendant is one of the persons *prima facie* liable will, except in one case, have proved all that is necessary to establish a *prima facie* right to the relief which he seeks. The exception alluded to is contained in § 3 (3) (*c*), and relates only to directors of a company in existence at the passing of the Act, which has already issued shares or debentures. In such a case, in order to make a director liable for an untrue statement contained in a prospectus or notice issued for the purpose of raising further capital, by subscriptions for shares or debentures, the plaintiff must prove that the director authorised the issue of the prospectus or notice or has adopted or ratified it. Burden of proof.

Exception in favour of directors of existing companies.

engaged in procuring the formation of the company, § 3 (2).

(*b*) It is conceived that "authorised" in this subsection would include subsequent adoption or ratification. See *Peck v. Derry*, 37 Ch. Div. p. 569, and *Denham & Co.*, 25 Ch. D. 752; but see § 3 (3), where authority, adoption, and ratification are all expressly mentioned.

(*c*) It would seem that the issue of the shares and debentures referred to in the opening words of this subsection must have taken place before the commencement of this Act, otherwise the following absurdity would arise. The directors of a company existing at the passing of the Act which had not issued any shares or debentures before the passing of the Act would not be entitled to the benefit of this subsection the first time they issued a prospectus for shares or debentures, but would be entitled to this benefit on any subsequent issue of a prospectus.

This subsection only refers to debentures, while the

first subsection mentions shares, debentures, and debenture-stock. There can be no reason for the omission of debenture-stock in the third subsection, at the same time there is a difficulty in construing debentures as including debenture-stock in the third subsection when they are both expressly mentioned in the first subsection. Consider also the title of the Act; and *Attree v. Hawe*, 9 Ch. Div. p. 349, where, however, it should be remembered that James, L. J., was dealing with debenture-stock issued under §§ 22-24 of the Companies Clauses Act, 1863, and *Re Bodman* [1891], 3 Ch. 135.

The subsection only extends to directors and not to any of the other persons mentioned in the first subsection.

The subsection is only expressed to extend to untrue statements in the prospectus or notice itself; the words of the first subsection are wider. See, also, §§ 3 (2), 4 and 5, and *infra*, p. 122.

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Defences under
this section.

The defendant may, however, escape liability under this section by proving—

A. With respect to every such untrue statement :

1. not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of allotment believe (d) that the statement was true (e).
2. purporting to be a statement by an engineer, valuer, accountant, or other expert (f), that the untrue statement fairly represented the statement of such person ;
3. contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant, or other expert, that the untrue statement is a correct and fair copy of or extract from such report or valuation :

If the defendant proves what is above stated to be required of him in the two last-mentioned cases, he will still be liable if it is proved (and the onus here is upon the plaintiff), that he had no reasonable ground to believe that the person making the statement, report or valuation, was competent to make it (g) ;

4. purporting to be a statement by an official person, that the untrue statement is a correct and fair representation of such statement ;

(d) A person who sets up this defence may be ordered to give particulars of the grounds of his belief. *Alman v. Oppert* [1901], 2 K. B. 576. Apart from this statute if a director did believe, and this was proved, the reasonableness or unreasonableness of the ground of his belief was immaterial. See *Derry v. Peek*, 14 App. Ca. 337, and *supra*, p. 92.

(e) See *supra*, p. 87. *Qu.* will this be a sufficient defence if the statement was true when made,

but has since become false, and the defendant either did not believe or did not have any reasonable ground for believing in the continuance of its truth ?

(f) Expert includes any person whose profession gives authority to a statement made by him. See § 3 (4).

(g) The honesty or dishonesty of the expert, whether known or not, is apparently immaterial for the purposes of this Act.

5. contained in what purports to be a copy of, or an extract from a public official document,

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that the untrue statement is a correct and fair copy of or extract from such document.

B. With respect to his responsibility for the untrue statement:

1. that having consented to become a director of the company, he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent; or
2. that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent (*h*); or
3. that after the issue of such prospectus or notice, and before allotment thereunder, he on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal and of the reason therefor to be given (*i*).

It would seem that an action for damages under this Act will not lie against the personal representatives of the deceased director or other person liable for the untrue statement (*h*).

Deceased directors.

The period of limitation within which an action under this Act must be brought is apparently six years, reckoned from the time when the shares or debentures were subscribed for (*l*).

Statute of Limitations.

A claim under this Act against the directors who issued the

(*h*) The first two defences under this head are not applicable in cases in which the plaintiff has to prove that the defendant authorised the issue of the prospectus. The words "without his knowledge or consent" may possibly prevent any person raising this second defence who knew of the issue of the prospectus, although he may have protested against its issue and given public notice that it was issued without his consent. *Sed qu.* and

see Mr. Bower's edition of the Directors Liability Act, 1890, p. 128.

(*i*) *Qu.* how far this is a good defence apart from the statute, see *supra*, p. 114.

(*k*) *Re Duncan, Terry v. Sweeting* [1899], 1 Ch. 387; *Frankenburg v. Great Horseless Carriage Co.* [1900], 1 Q. B. 504.

(*l*) *Thomson v. Lord Clanmorris* [1900], 1 Ch. 719.

Bk. I. Chap. 3. prospectus may be joined with a claim for rescission against
Sect. 2. the company (n).

Persons entitled to indemnity under the Act. The Act (§ 4) gives certain persons liable for an untrue statement a right of indemnity against others who are liable therefor. The persons entitled to such indemnity are any person named in the prospectus or notice as a director, or as having agreed to become a director, who has not consented to become a director or has withdrawn his consent before the issue of the prospectus or notice, and has not authorised or consented to the issue thereof.

Persons liable to indemnify directors. The persons liable to indemnify such persons are :—

1. Directors other than those without whose knowledge or consent (n) the prospectus or notice was issued, and
2. Any other person who authorised the issue of the prospectus or notice.

Prospectus or notice. It is conceived that prospectus or notice in this and the following section includes any such report or memorandum as is mentioned in § 3.

Extent of indemnity. The indemnity is against all damages (o), costs, charges, and expenses to which the person entitled to the indemnity may be made liable by reason of his name having been inserted in the prospectus or notice, or in defending himself against any action or legal proceeding brought against him in respect thereof.

Contribution. The Act further (§ 5) gives certain persons made liable for an untrue statement a right of contribution from others which they would not otherwise enjoy.

Persons entitled. Every person who has become liable to make any payment under the provisions of the Act by reason of his

1. being a director,
 2. being named as a director,
 3. being named as having agreed to become a director,
 4. having authorised the issue of the prospectus,
- is entitled to contribution, under § 5.

(m) *Frankenburg v. Great Horseless Carriage Co.* [1900], 1 Q. B. 504, and *supra*, p. 91.

(n) See, as to these words, note (h).

(o) From a comparison of this

section with § 3 (see, especially, *supra*, Defence B 1), it would appear that any person entitled to indemnity under this section has a good defence to an action under § 3.

Any person who, if sued separately, would have been liable to make the same payment is liable to contribute towards its payment, that is to say, that if the person seeking contribution seeks it in respect of damages which have been recovered from him under § 3 of the Act, the persons liable to contribute will be persons against whom such damages might have been recovered ; if the person seeking contribution seeks it in respect of any indemnity he may have had to pay under § 4, the persons liable to contribute will be persons who were themselves liable to pay the indemnity.

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Persons liable.

The right to contribution is the same as in cases of contract.

By virtue of this section, if a plaintiff brings an action under this Act against one or some only of the persons who are liable to him, a defendant may make use of the third party procedure for the purpose of obtaining contribution or indemnity from his co-defendants, and the other persons who are liable to the plaintiff (p).

Third party
procedure.

It will be observed that the right of contribution is limited to persons liable to make any payment under the provisions of this Act ; it would, therefore, seem that if the plaintiff brought an action for damages for deceit against one or some only of the persons liable to him and did not proceed under this Act, the defendant would not be entitled to contribution under § 5.

Contribution.

A promoter who has taken part in the preparation of the prospectus but has not authorised its issue, may be liable under § 3 if he knew of its issue, or, if the prospectus was issued without his knowledge or consent, if he has not given reasonable public notice that the prospectus was issued without his knowledge or consent, and consequently may be liable under § 5 to pay contribution to another from whom damages have been recovered under the third section (q), but unless he has authorised the issue of the prospectus he does not appear to be liable either to indemnify a director under § 4 or to contribute to such indemnity under § 5, or to be entitled under § 5 to contribution towards any damages which may have been

Promoters.

(p) See R. S. C. Order xvi. Rules 48—55, and notes thereon in the Annual Practice.

(q) See the wording of § 3 (1), the definition of a promoter in § 3 (2), and the final words in § 5.

Bk. I. Chap. 3. recovered against him under the third section. *Sed qu.* if a
 Sect. 2. promoter is entitled to contribution in any event.

2. *The Companies Act, 1900.*

63 & 64 *Vict. c.* 48, §§ 2, 9, and 10.

The Companies Act, 1900, requires certain particulars to be stated in prospectuses relating to companies governed by the Companies Acts (*r*). These requirements relate to prospectuses which offer shares, debentures, or debenture stock in such companies to the public for subscription or purchase (*s*). The particulars which these sections require to be stated, and the prospectuses to which the sections apply, have been already discussed (*t*).

Waiver clause.

In late years it has been a common device of promoters and others to endeavour to escape from the duty of disclosure imposed upon them by the repealed § 38 of the Companies Act, 1867, by introducing into the prospectus, or into the form of application which accompanied it, a clause by which the applicant purported to waive his right of disclosure, and much ingenuity was expended in framing clauses for this purpose (*u*).

The validity of these clauses, however skilfully framed, was open to grave doubt, and they were certainly invalid unless they fairly disclosed the circumstances conferring the rights which the applicants were to waive (*x*). To frustrate any similar attempt to evade the requirements of § 10, which is the most important of the three sections in question, it is enacted that any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of that section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void (*y*). The consequences, therefore, of not complying with these requirements cannot be evaded; it is now proposed to discuss what these consequences are.

(*r*) §§ 2, 9 & 10.

(*s*) § 30.

(*t*) *Supra*, pp. 39 *et seq.*, and 44 *et seq.*

(*u*) See Mr. Palmer's Company Precedents, 7th ed., Part I., p. 125 *et seq.*

(*x*) *Greenwood v. Leather Shod*

Wheel Co. [1900], 1 Ch. 421; *Cackett*

v. Keswick, W. N. 1901, p. 159;

Batey v. Keswick, W. N. 1901, p. 167.

(*y*) § 10 (*5*); there is a similar clause in § 4.

The Act imposes no penalty for non-compliance with the requirements now under consideration (z), nor does it state what the consequences of such non-compliance may be. But so far as § 10 is concerned it expressly leaves untouched any liability which may be incurred under the general law (including no doubt the Directors Liability Act, 1900) apart from that section (a). A prospectus, therefore, may comply with all the requirements of the Act, and yet be so misleading and fraudulent as to entitle any person who has taken shares or debentures on the faith of it to all or any of the remedies by way of rescission or damages which have been discussed in the preceding pages.

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In considering the consequences of non-compliance with the requirements of the Act the first question which arises is, has a person who has taken shares or debentures from the company on the faith of a prospectus which does not comply with these requirements, a right on this ground alone to rescind his contract? It is to be observed that non-compliance with the requirements of § 38 of the Companies Act, 1867, did not in itself give a right of rescission, although under that section a prospectus which did not comply with its requirements was to be deemed fraudulent (b). It is also to be remembered that non-disclosure of a material fact is not a ground for rescission unless the statements actually made are thereby rendered misleading (c). It is therefore apprehended that this question must be answered in the negative (d). If, however, the omission of any particular required by the Act renders what is stated misleading in a material respect, such a person would, as already explained, have a right to rescind if the non-compliance was imputable to the company. It may be that if the prospectus omits or makes a false statement in reference to any of the particulars required to be stated, the Court will consider any such omission or false

Rescission.

(z) A prospectus is not a document required by or for the purposes of the Act within the meaning of § 28.

(a) § 10 (8).

(b) *Sullivan v. Metcalfe*, 5 C.P.D. 455. This section, which is repealed by § 33 of the Act of 1900 and the decisions thereunder, will be found

discussed at the end of this chapter.

(c) See *supra*, p. 88.

(d) This is in accordance with the recommendation of the Committee appointed by the Board of Trade. See p. xiii. of the Report referred to *ante*, p. 40, note (k).

Bk. I. Chap. 3. statement, unless obviously trivial, to be material when apart
Sect. 2. from the Act it would not have done so.

Personal
liability.

The next question is, does a director or other person responsible for a prospectus which does not comply with the requirements of the Act incur any liability—apart from any liability he may incur in an action for deceit or under the Directors Liability Act, 1890—merely by reason of such non-compliance? It is apprehended that he does so except in certain cases of ignorance and mistake specially provided for by § 10 (e). The Act imposes upon persons responsible for any prospectus to which it applies an absolute statutory duty to comply with its requirements, and the Act does not impose any penalty for the breach of this duty. Therefore it is apprehended that any person responsible for such a prospectus who wilfully disobeys the Act and omits to comply with its requirements is liable to an indictment for such non-compliance (f).

Criminal.

Civil—in
damages.

Further, persons who are guilty of a breach of an absolute statutory duty imposed for the benefit of others, are liable at the instance of the person grieved for any damage they may suffer by reason of such breach of duty (g), and there is no apparent reason why this rule should not apply in the present instance. Moreover, neither ignorance nor mistake on the part of a person guilty of a breach of an absolute statutory duty affords him any defence to an action for damages caused by such breach (h). It is doubtless to modify this rule that § 10 contains a clause excluding liability for non-compliance with the requirements of the section in certain cases of ignorance and mistake; this clause (§ 10 (7)) cannot relate to any liability apart from the section, for the section does not limit or diminish any such liability (i).

If the above view is correct any person for whose benefit the requirements in question are inserted in the Act will have an action for damages for non-compliance therewith.

(e) § 10 (7) noticed below.

(f) Stephen's Digest of Criminal Law, Art. 134; Coke, 2 Inst. 163; and Wilberforce on Statute Law, p. 67.

(g) See Coke, 2 Inst. 163; *Ewer v. Jones*, 2 Ld. Raym. 737; *Couch*

v. Steel, 3 E. & B. 402; *Groves v. Wimborne*, [1898] 2 Q. B. 402; *Pickering v. James*, L. R. 8 C. P. 489; and other cases of that class.

(h) See cases in note (g).

(i) § 10 (8).

These requirements are obviously introduced for the protection of persons who on the faith of the prospectus subscribe for or purchase any of the shares or debentures which the prospectus offers for subscription or purchase (*k*). It may also be that if the prospectus offers shares or debenture for subscription, a person who purchases them in the market on the faith of the prospectus will be within the protection of the section (*l*). If, therefore, a person subscribes for or purchases any shares or debentures on the faith of a prospectus offering them for subscription or purchase which does not comply with the requirements of the Act, it would seem that except in certain cases hereafter mentioned all persons responsible for the prospectus are liable to him in damages for any loss he may thereby sustain (*ll*). Speaking generally, it is conceived that the measure of damages will be the same as in an action of deceit (*m*). If, however, the non-compliance is of such small importance that it would not have influenced any reasonable person's judgment, or if it did not in fact influence the applicant's judgment, in applying for the shares or debentures, it is apprehended that even if any action would lie the damages will be nominal, as the breach of duty would not have caused the damage (*mm*). But, as before remarked, an omission of, or mis-statement as to, any particulars required by the section may be considered material when apart from the Act it would not be so.

Further, it is conceived that the requirements in § 2, and perhaps also those contained in the other sections, were inserted for the benefit of the company, if the prospectus is issued on its behalf, as well as for the benefit of applicants. If this be so, those responsible for a prospectus which does not comply with these requirements will be liable for any damage which the company may have thereby sustained.* If, however, non-compliance with these requirements does not give applicants a right of rescission it is difficult to see what damage the company will suffer by such non-compliance. It is apprehended

(*k*) § 30.

(*l*) See *supra*, p. 114. *Qu.* if he purchases or subscribes for another class of shares or debentures than those offered by the prospectus.

(*ll*) This is in accordance with the recommendations of the Board

of Trade committee; see p. xiii. of the Report referred to, *ante*, p. 40, note (*k*).

(*m*) See *supra*, p. 115, and *Cuckett v. Keswick*, W. N. 1901, 159.

(*mm*) See *Buley v. Keswick*, W. N. 1901, p. 167.

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Sect. 2.

Liability to
persons
subscribing for
shares, &c.

Liability to the
company.

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Sect. 2.

that the damage a company may suffer by reason of a person who is named in a prospectus as a director without the requirements of § 2 having been complied with, failing to acquire his qualification shares, cannot be recovered from the persons responsible for the prospectus; for the improper introduction of his name in the prospectus is not the cause of the damage. If non-compliance with the requirements of the Act does give a right of rescission, and many applicants take advantage of it, the damages may be very large indeed. This liability to the company, if it exists, may be enforced in an action, or probably by proceedings for misfeasance under § 10 of the Companies Winding-up Act, 1890, if the company is being wound up, and the persons responsible are within the scope of that section, and issued the prospectus by or on behalf of the company (*n*).

Exemptions from
liability for
non-compliance
with § 10.

The clause in § 10 of the Companies Act, 1900, which excludes liability in certain cases for non-compliance with the requirements of that section, is sub-clause 7. By the provisions of that clause, in the event of non-compliance with *any* of the requirements of the section, a director or other person responsible for the prospectus, does not incur any liability by reason of the non-compliance if he proves (the onus being on him) that (1) as regards any matter not disclosed he was not cognisant thereof, or (2) the non-compliance arose from an honest mistake of fact on his part. Further, in the event of non-compliance with the requirements of the section, which relate to the disclosure of the directors' interest in the promotion or property of the company and of the sums paid them for their qualification or services in connection with the formation of the company, no director or other person incurs any liability in respect of such non-compliance unless it be proved—and the onus of proof is on the person seeking to enforce the liability—that he had knowledge of the matters not disclosed.

3. *Companies Act, 1867.*

30 & 31 *Vict. c. 131*, § 38.

Although § 38 of the Companies Act, 1867, has been repealed by the Companies Act, 1900, the following remarks upon its provisions and the cases decided thereunder have been retained for purposes of reference.

(*n*) See as to this section, *infra*, Bk. IV., c. 1, § 7.

In order the more effectually to protect shareholders (o) from frauds on the part of the promoters of companies, every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, was required to specify the dates and names of the parties to any contract entered into by the company or the directors, promoters, or trustees thereof before the issue of such prospectus or notice (p). The statute which rendered this necessary was very badly worded and gave rise to much discussion and no little difference of opinion. In the first place it did not apply to all companies, but only to those formed under the Companies Act, 1862. In the next place the information required to be given was practically worthless: the Act only required dates and names to be given: it did not require the nature and effect of the contracts to be stated; but it is obvious that this is what is most material to be known. If there were any matters in the contracts which were material to be known and the omission of which caused the prospectus to be misleading, compliance with the statute did not constitute a sufficient disclosure of them (q).

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Sect. 2.
Fraudulent
prospectus.
30 & 31 Vict.
c. 131, § 38.

Compliance with the statute did not prevent a false prospectus from being treated as fraudulent if in truth it was so. The object of the statute was to enlarge, not to restrict, the doctrines relating to fraudulent prospectuses; and this object was sought to be attained by declaring that prospectuses should be deemed fraudulent unless the dates and names of the parties to certain contracts were disclosed (r). The contracts referred to were not clearly defined, but it is obvious that only those could be meant which could be regarded as material to persons who might become shareholders. The result of the decisions on this extremely ill-expressed enactment seems to be as follows:—

1. The enactment was not confined to contracts to be performed by the company, but extended to all contracts (s), whether in writing or not (t), entered into by the persons mentioned, and directly or indirectly affecting the formation, management, capital, or other property of the company, or the position of the directors or officers of the company with respect to the company, its promoters or vendors, and which might reasonably influence a person in determining whether to apply for shares or not (u).

2. The enactment did not extend to contracts by which the promoters themselves had become owners of the property which they afterwards

(o) Bondholders are not within the enactment. *Cornell v. Hay*, L.R. 8 C. P. 328.

(p) 30 & 31 Vict. c. 131, § 38. It is printed in the Appendix.

(q) *Aaron's Reefs, Ltd. v. Twiss* [1896], A. C. 273.

(r) See generally as to this *Greenwood v. Leather Shod Wheel Co.* [1900], 1 Ch. 421.

(s) An understanding between the persons mentioned not amount-

ing to a contract is not within the section. *Arkwright v. Newbold*, 17 Ch. D. 301.

(t) *Arkwright v. Newbold*, 17 Ch. D. 301; *Cupel & Co. v. Sims' Composition Co.*, W. N. 1888, p. 97.

(u) *Cackett v. Keswick*, W. N. 1901, 159; *Batey v. Keswick*, ib., p. 167; *Sullivan v. Mitaulfe*, 5 C. P. D. 455; *Twycross v. Grant*, 2 C. P. D. 469; *Jury v. Stoker*, 9 L. R. Ir. 385; *Cornell v. Hay*, L. R. 8 C. P. 328.

Bk. I. Chap. 3. sold to the company if such contracts in no way affected the company
 Sect. 2. itself (x).

3. The words promoter, director, or trustee included persons engaged in forming the company, or engaged in inducing the public to take shares in it when formed (y): and perhaps even persons who were not so engaged when the contract with them was entered into, but who afterwards became promoters, directors or trustees (z).

4. A person who took shares on the faith of a prospectus, not complying with the enactment in question, was not entitled, simply on that ground, to rescind his contract to take the shares (a); but was only entitled to maintain an action for damages against the promoters, directors, or trustees who knowingly issued the prospectus (b).

Waiver clauses. It had become customary to insert in prospectuses, and the application forms issued with them, a clause to the effect that applicants for shares waived all claims against directors for infringements of § 38, but the validity of such clauses was in any case very doubtful. They were certainly invalid unless they fairly disclosed the circumstances which conferred the rights which applicants thereby purported to waive (c).

(x) *Sullivan v. Mitcalfe*, 5 C. P. D. 20 Eq. 114. *Sed quere*: see 5 Ch. D. 118.

(a) *Ib.*
 (b) *Ib.*, and *Twycross v. Grant*, *ubi sup.*; *Batey v. Keswick*, W. N. 1901, 167.

(y) *Twycross v. Grant*, 2 C. P. D. 469. See *infra*, Bk. III., c. 2, § 1.

(z) *Sullivan v. Mitcalfe*, 5 C. P. D. 455; *Gover's case*, 1 Ch. D. 182, and *Batey v. Keswick*, *ib.* 167.

CHAPTER IV.

OF DIFFERENT CLASSES OF COMPANIES.

HAVING made the foregoing observations on companies in Bk. I. Chap. 4.
 general, it is proposed to advert to the formation of different Formation of
 kinds of companies, and to the evidence by which a person companies.
 may be proved to be a shareholder in them.

It will be convenient to take them in the following order :—

CLASS I. Cost-book mining companies.

CLASS II. Companies incorporated or privileged by the Crown, viz. :—

1. Chartered companies.
2. Companies formed under the Letters Patent Act,
7 Wm. 4 & 1 Vict. c. 73.

CLASS III. Companies incorporated or privileged by some special Act of Parliament, viz. :—

1. Companies not incorporated, but empowered to sue and be sued.
2. Incorporated companies.

CLASS IV. Companies incorporated or privileged by a general Act of Parliament, viz. :—

1. Banking companies formed under 7 Geo. 4, c. 46.
2. Registered companies.

Life assurance companies fall under one or other of the classes 2, 3, or 4, unless they are merely large partnerships, which is seldom, if ever, the case. They are, however, subject to the special Acts 33 & 34 Vict. c. 61, 35 & 36 Vict. c. 41, and 59 Vict. c. 8, which are printed in the Appendix. The provisions of these Acts which bear upon the subjects now under discussion will be referred to at the end of the chapter.

CLASS I.—COST-BOOK MINING COMPANIES.

Cost-book mining companies are sometimes represented as Cost-book
 differing essentially from ordinary partnerships; but there is companies.

Bk. I. Chap. 4.
Class 1.

no authority for this statement ; and it may be said with more truth that cost-book mining companies are mere partnerships governed by the general law of partnership, except so far as that law is excluded by local custom or by special agreement referring to and embodying such custom (a).

Partnership
Act, 1900.

It must, however, be remembered in applying the general law of partnership to cost-book mining companies that the Partnership Act, 1900, with the exception of § 23, does not apply to these companies (b). The Act, however, is mainly declaratory of the existing law, and with one exception has introduced no change of importance ; it does not deal with the whole of the law applicable to partnerships, and expressly provides that the existing rules of common law and equity shall continue in force except so far as they are inconsistent with the provisions of the Act (c). The one exception above alluded to is contained in § 23, and deals with the mode of making a partner's share in the partnership assets available for the payment of his separate debts.

Cost-book.

A cost-book mining company is formed by agreement. A number of adventurers who have obtained permission to work a lode agree to share the enterprise in certain proportions. It is seldom that they agree on a fixed capital (d). They appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine, subject to the control of the shareholders. They write in a book called the "cost-book" the agreement into which they have entered ; and in this same book are inserted from time to time the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares (e). The

(a) See *Frank Mills Mining Co.*, 23 Ch.D. 52; *Prosper United Mining Co.*, 7 Ch. 286; and as to cost-book mining companies, 32 & 33 Vict. c. 19, amended by 50 & 51 Vict. c. 43, and the Stannaries Court Abolition Act, 1896, 59 & 60 Vict. c. 45; the Readwin Prize Essay on the Cost-book, by Tapping; Macswinney on Mines, 7th ed., p. 507 *et seq.*; Collier on Mines, ed. 2, pp. 111

et seq.; Batten's Stannaries Act, 1869.

(b) 53 & 54 Vict. c. 39, § 1.

(c) See Partnership, Introduction, pp. 1-9.

(d) Mr. Batten in his useful little treatise, p. 31, says that a true cost-book company never has a fixed capital.

(e) See 32 & 33 Vict. c. 19, § 9, and 50 & 51 Vict. c. 43, §§ 23 & 24.

shares are transferable and may be relinquished; they may also be sold by the company for non-payment of calls; and these circumstances, rather than any other, distinguish cost-book mining companies from common partnerships (*f*). Bk. I. Chap. 4.
Class 1.

Some persons imagine that the liability of shareholders in cost-book mining companies is limited; that both their past as well as their future liability is got rid of as soon as they have transferred their shares, and that they are in no case liable for the debts of the mine if they have paid the calls which may have been made upon their shares. All this is mere delusion; and although it is true that a shareholder can as between himself and co-shareholders get rid of his liability by transferring or relinquishing his shares (*g*), there is no authority whatever for saying that the liabilities of the shareholders to creditors were until lately governed by principles in any respect different from those which apply to ordinary partnerships (*h*). By the Stannaries Act, 1869 (32 & 33 Vict. c. 19, s. 25), however, a past shareholder is not liable to contribute to the assets of the company if he has ceased to be a shareholder two years or upwards before the date of the winding-up order (*i*).

Whoever alleges that a cost-book mining company is in any respect governed by a local usage which excludes the application of the general law of partnership, must prove the existence of such usage (*k*); for the Courts do not take judicial notice of Mining customs
not judicially
noticed.

Scmble, the rules and regulations must now be filed with the registrar of the county court in Cornwall. See 32 & 33 Vict. c. 19, § 9, and 59 & 60 Vict. c. 45, § 1, and the Lord Chancellor's order thereunder dated 16th December, 1896, printed in the Appendix. They were formerly filed with registrar of the Stannaries Court.

(*f*) 32 & 33 Vict. c. 19, §§ 16-23.

(*g*) *Fenn's case*, 4 De G. M. & G. 285; *Mayhew's case*, 5 ib. 837; *Bodmin United Mines*, 23 Beav. 370; *Birch's case*, 2 De G. & J. 10; *Loft-house's case*, ib. 69.

(*h*) Shareholders in a cost-book mine were held liable to creditors for goods supplied in *Tredwen v. Bourne*, 6 M. & W. 461; *Newton v. Daly*, 1 Fos. & Fin. 26; *Lanyon v. Smith*, 3 B. & Sm. 938; *Harvey v. Clough*, 2 N. R. 204. See, too, *Ellis v. Shmæck*, 5 Bing. 521; *Peel v. Thomas*, 15 C. B. 714; *Toll v. Lee*, 4 Ex. 230.

(*i*) *In re Wheal Unity Wood Mining Co.*, *Chynoweth's case*, 15 Ch. D. 13, at p. 21.

(*k*) See *ante*, note (*a*), and the cases cited below.

Bk. I. Chap. 4. what the cost-book principle is ; and they invariably apply the
 Class 1. general law of partnership to companies formed on that principle, unless it is proved that the application of such law is excluded as alleged (l).

Proof of membership in a cost-book company. The question whether a person is or is not a shareholder in a cost-book mining company must be determined in precisely the same way as the question whether a person is or is not a member of an ordinary partnership (m). The usual mode of proving that a person is a shareholder in a cost-book mine is by showing that he has signed the cost-book or an authority for the insertion of his name in it : and it has been said to be part of the cost-book principle that a register of shareholders should be kept, and that every member should sign either the book itself or an authority for the insertion of his name in it (n). At the same time, a person clearly may, as between himself and third parties, incur the liabilities of a shareholder without signing the cost-book or any such authority as that referred to (o) ; and it is apprehended that a person may be a shareholder as between himself and the other members although he may not have signed the cost-book or any authority for the insertion of his name in it. Indeed there is reason for going further, and for denying that any such signature is essential ; for an attempt to prove it to be so is reported to have failed, the evidence adduced amounting only to this, that it was usual

Signing the cost-book.

(l) See *Hawkins' case*, 2 K. & J. 253 ; *Bodmin United Mines*, 23 Beav. 370 ; *Fenn's case*, 4 De G. M. & G. 285 ; *Hart v. Clarke*, 6 ib. 232, and 6 H. L. C. 633 ; *Sibley v. Minton*, 27 L. J. Ch. 53, V.-C. Kindersley. Before the County Court (Stannaries Jurisdiction) Rules, 1897, came into operation the pursuer could sue a shareholder for calls (see 32 & 33 Vict. c. 19, § 13), though he could not present a bankruptcy petition in his own name against him in respect of a judgment debt for such calls. *Ex parte Ashmead* [1893], 1 Q. B. 590. But by Rule 5 of the rules above referred to pursuers' suits are abo-

lished. See before this Act, *Hybart v. Parker*, 4 C. B. N. S. 209.

(m) See *Peel v. Thomas*, 15 C. B. 714 ; *Tredwen v. Bourne*, 6 M. & W. 461 ; *Thomas v. Clark*, 18 C. B. 662.

(n) See *Tippet v. Johns*, Tapping's Essay, p. 187 ; *Toll v. Lee*, 4 Ex. 230. Such a register is now required, see 32 & 33 Vict. c. 19, § 9.

(o) See *Martyn v. Gray*, 14 C. B. N. S. 824, as to holding out ; and see *Cox's case*, 4 De G. J. & Sm. 53, where a person entitled to shares tried to screen himself from liability by holding them in the names of other people.

for every member to testify his acceptance of shares by writing under his hand (*p*). Bk. I. Chap. 4.
Class 1.

In *Vice v. Anson* (*q*), the Court seems to have thought that a person could not be a shareholder in a cost-book mining company unless he acquired some interest in the mine, treating it as land, and that some deed conveying him an estate in the land was requisite. But this opinion cannot be supported; and it seems clear that shares in a cost-book mining company are transferable by entries in the cost-book; and that a person who is entered therein as a shareholder in respect of shares accepted by him is a shareholder, although no deed or writing at all has been executed (*r*). Shares in cost-book mining companies are ordinarily transferred by a document in which the transferor acknowledges that he has transferred, and the transferee acknowledges that he has accepted the shares mentioned. This document is signed by both parties, is addressed to the purser, is sent to him by the transferee, and is the authority to the purser to register the transferee as a shareholder (*s*). Transfer of
shares.

By the Stamp Act, 1891 (54 & 55 Vict. c. 39, § 1), and Stamp schedule, title *Transfer*, a 6d. stamp duty is imposed upon "any request or authority to the purser or other officer of any mining company conducted on the cost-book system, to enter or register any transfer of any share or part of a share in any mine; or any notice to such purser or officer of such transfer" (*t*); and any person who executes, or any person or other officer of the company who acts on any such request not being duly stamped is liable to a penalty (*u*).

Companies engaged in working mines within and subject to Registration.

(*p*) *Northey v. Johnson*, 19 L. T. 104, Q. B. 1852. That this is usual there can be no doubt; it is expressly required by the rules of most large mines.

(*q*) 7 B. & C. 409.

(*r*) See *Tippet v. Johns*, Tapping's Essay, p. 187; *Reynolds v. Bassett*, Collier on Mines, 124, note; *Vivyan v. Mowatt*, 8 L. T. Ex. 480; *Northey v. Johnson*, 19 L. T. 104; *Toll v. Lee*, 4 Ex. 230; Macswinney

on Mines, 7th ed., p. 532 *et seq.* Compare *Curling v. Flight*, 5 Ha. 242; 6 ib. 41; and 2 Ph. 643.

(*s*) *Toll v. Lee*, 4 Ex. 230; *Walker v. Bartlett*, 18 C. B. 845. See, as to parol transfers, *Northey v. Johnson*, 19 L. T. 104, Q. B. See, also, 32 & 33 Vict. c. 19, §§ 14, 15, and 35.

(*t*) The cost-book itself requires no agreement stamp. See *Vivyan v. Mowatt*, 8 L. T. Ex. 480.

(*u*) 54 & 55 Vict. c. 39, § 110.

Bk. I. Chap. 4. the jurisdiction of the Stannaries, need not be registered
 Class 1. under the Companies Act of 1862 (*x*); but if their capital is fixed, and if there are seven or more shareholders, they may be so registered, with or without limited liability. If the capital is not fixed, the company cannot apparently be registered as an existing company with limited liability (*y*). The effect of registration under the Companies Act, 1862, will be considered hereafter (*z*). If not registered under that Act, cost-book mining companies working mines within the Stannaries are subject to the provisions of 32 & 33 Vict. c. 19, and if working metalliferous mines or tin streaming works, to the provisions of 50 & 51 Vict. c. 43, which will be noticed in their proper places.

The jurisdiction which used to be vested in the Court of the Vice-Warden of the Stannaries is now vested in the county courts of Cornwall (*a*), and the procedure is regulated by the County Court (Stannaries Jurisdiction) Rules, 1897 (*b*).

CLASS II.—COMPANIES CHARTERED OR PRIVILEGED BY THE CROWN.

1. *Chartered companies.*

Chartered companies.

The Crown has at common law the power of incorporating by charter any number of persons who assent to be incorporated, and a chartered company is therefore formed as soon as a charter is granted to, and accepted by, two or more individuals, enabling them, alone or with others, to trade as a body corporate (*c*). The Crown, however, has no power to

(*x*) 25 & 26 Vict. c. 89, § 4.

(*y*) See 25 & 26 Vict. c. 89, § 179, cl. 3, and § 181.

(*z*) As to the effect of registration with respect to retired shareholders, see *Lanyon v. Smith*, 3 B. & Sm. 938; and *Harvey v. Clough*, 2 N. R. 204.

(*a*) 59 & 60 Vict. c. 45, § 1, and order of the Lord Chancellor under

that Act, dated 16th December, 1896, printed in the Appendix.

(*b*) These rules form Order Lc. of the County Court Rules.

(*c*) See, as to charters, Grant on Corporations, pp. 9 *et seq.* As to charters for a limited time, see 7 Will. 4 & 1 Vict. c. 73, § 29, and 47 & 48 Vict. c. 56.

incorporate persons against their will (*d*); nor can the Crown force a new charter upon a corporation after it is once established; nor can the Crown, without the authority of an Act of Parliament, so incorporate persons as to make them liable for the debts of the corporation (*e*). A charter which has been confirmed by Act of Parliament cannot be varied by the Crown (*f*); but a charter which has not been so confirmed may, without being formally surrendered (*g*), be varied by a subsequent and inconsistent charter (*h*), provided the new charter is accepted by the body corporate (*i*), i.e., by a majority of the members composing it (*k*).

Bk. I. Chap. 4.
Class 2.

A chartered company is a corporation existing for the purposes for which it is created and no others; and those persons only are members of it who are declared to be so by the charter, or who have been admitted in compliance with the charter and the bye-laws made in pursuance of it (*l*). The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement amongst themselves to annul or legally do anything at variance with their charter (*m*). This subject will be adverted to hereafter.

A chartered company, being a corporation, is not a partnership, although the company may have gain for its object, and the members of the company may share profits.

Chartered company not a partnership.

A charter is not necessarily valid; for it may have been obtained from the Crown by misrepresentation, or

Validity of charters.

(*d*) Grant, pp. 13 and 18; *Dr. Askew's case*, 4 Burr. 2200, per Yates, J.; and see *Rutter v. Chapman*, 8 M. & W. 1.

(*e*) *Elve v. Boyton* [1891], 1 Ch. 501; and see *ante*, p. 10, note (*o*).

(*f*) *R. v. Miller*, 6 T. R. 268; but see *Royal Exch. Ass. Co. v. Vaughan*, 1 Burr. 155.

(*g*) *R. v. Larwood*, 1 Salk. 168.

(*h*) *Ib.*; and *R. v. Haythorne*, 5 B. & C. 410; *Royal Exch. Ass. Co. v. Vaughan*, 1 Burr. 155.

(*i*) Bull. N. P. 212, c.; *R. v. Pasmore*, 3 T. R. 240.

(*k*) *R. v. Hughes*, 7 B. & C. 708.

In *Ward v. The Society of Attorneys*, 1 Coll. 370, an injunction was granted to restrain the majority from accepting a new charter. See *Ex parte The Society of Attorneys*, 8 Ch. 163, for the grounds on which the grant of a supplemental charter can be successfully opposed.

(*l*) *Dr. Askew's case*, 4 Burr. 2200, per Yates, J.

(*m*) See *The Society of Practical Knowledge v. Abbott*, 2 Beav. 559. As to giving effect to the practice of the members and allowing that to control the charter, see *Somes v. Currie*, 1 K. & J. 605.

Bk. I. Chap. 4. it may have been granted by the Crown in excess of its
Class 2.

prerogative, and in either case the charter will be void. A charter which has been obtained from the Crown by false and fraudulent statements may be formally annulled by *scire facias* (n); but although a charter which has not been thus annulled is to be treated as valid until the contrary is proved, there is apparently no rule to the effect that its validity is not to be disputed except in a formal proceeding instituted for the purpose of procuring its cancellation (o). At the same time those persons who have accepted or acted on a charter and treated it as valid cannot, unless in a proceeding to annul it, object that it was obtained from the Crown irregularly, or by the misrepresentation of themselves or their fellow-members, or of their predecessors (p). Indeed, it is said, that neither those who have accepted a charter, nor their successors, can dispute its validity; but this is very doubtful (q).

Charters how
obtained.

Charters are obtained by petitioning the King in Council. The petition and draft of the proposed charter are left at the Privy Council Office, and are then referred to the Board of Trade. The Colonial Office, Foreign Office, and India Office are also referred to, if the proposed company falls within their departments. If it is determined that a charter shall be granted, it issues under the great seal (r). But charters are now very seldom granted to trading companies.

A charter may be surrendered to the Crown; but a surrender is of no effect unless accepted and enrolled in the enrolment department of the central office of the Supreme Court of Judicature (s). After the surrender has been accepted and enrolled the corporation ceases to exist (t).

(n) *La Banque D'Hochelaga v. Murray*, L. R. 15 App. Cas. 414; *R. v. The Eastern Archipelago Co.*, 1 E. & B. 310; 2 ib. 856; and 4 De G. M. & G. 199. See, as to *sci. fu.* to repeal patents, 2 Wms. Saund. (ed. 1871), 251 *et seq.*

(o) Grant on Corp. 39, &c.

(p) See *Macbride v. Lindsay*, 9 Ha. 574.

(q) See Grant, 20—22.

(r) See Encyclopædia of the Laws of England, *tit.* Royal Charter; Wordsworth on Joint Stock Companies, p. 401, ed. 10; see, as to advertisements, 7 Will. 4 & 1 Vict. c. 73, § 32.

(s) See *R. v. Osbourne*, 4 East, 326, and Jud. (Officers) Act, 1879, 42 & 43 Vict. c. 78, §§ 4, 6 and 12 and R. S. C. Ord. LXI.

(t) Grant, 46.

2. *Companies formed under the Letters Patent Act,*
7 Will. 4 & 1 Vict. c. 73.

Bk. I. Chap. 4.
 Class 2.

Letters patent and charters are both *literæ patentæ* sealed with the great seal, and are, in fact, the same thing. But the Crown is empowered by the Act 7 Will. 4 & 1 Vict. c. 73 (*u*), to grant by letters patent to any company or body of persons, *although not incorporated* by such letters patent, any privileges which the Crown might at common law grant to any company or body of persons by any charter of incorporation. Letters patent under this Act are obtained on application to the King in Council, and notice of the application must be inserted three times in the "London Gazette," and in one or more of the newspapers, circulating in the county in which it is proposed that the principal place of business of the company shall be established, at intervals of not less than one week (*x*).

Companies
 governed by the
 Letters Patent
 Act.

Every company formed under this Act is required to be entered into by agreement under seal, in which are to be specified the number of shares in the company, the name of the company, the names of its members, the date of its commencement, the nature of its business, the place or principal place where such business is to be transacted, and also the names of two or more officers to sue or be sued on behalf of the company (*y*). Within three months after the grant of the letters patent, a return is to be made to the enrolment department of the central office (*z*) of all the above particulars, and of the date of the letters patent (*a*); and returns are required to be made of every change made in the company's principal place of business, and of every change amongst its shareholders (*b*), and of the officers by which it is to be sued (*c*). These returns are directed to be registered and to be open to the inspection of any person upon payment of a small fee (*d*).

Company's deed.

(*u*) Repealing 6 Geo. 4, c. 91, § 2, and 4 & 5 Will. 4, c. 94.

c. 78, §§ 4, 6 and 12, and R. S. C. Ord. LXI.

(*x*) 7 Will. 4, & 1 Vict. c. 73, § 32.

(*a*) Ib. § 6.

(*b*) Ib. §§ 7-10.

(*y*) Ib. § 5.

(*c*) Ib. § 13.

(*z*) In the case of an English company, see § 26, and 42 & 43 Vict.

(*d*) Ib. § 17.

Bk. I. Chap. 4. Class 2. A certified copy of the return is made evidence both in civil and in criminal proceedings (*e*).

Such companies not corporations. Companies formed under this Act are not corporations, but are essentially partnerships. Their privileges depend on the letters patent obtained by them. The possession of a common seal is taken for granted in the Act itself (*f*); but there is nothing requiring the seal to be affixed to a contract, in order to bind the company; and the Act is express that the members of the company are to be liable to its debts and engagements, except so far as that liability may be limited by the letters patent (*g*).

Members. Who are to be deemed members is not stated; that question therefore must depend in each case upon the provisions of the deed of settlement, and of the letters patent by which the particular company in question may be governed; but when once a person has become a member, his liability as a member continues, until a return of the means whereby he has ceased to be one is registered (*h*).

The Act does not state with any precision how shares are to be transferred, but a transfer, by deed or writing, is evidently contemplated (*i*).

This Act is seldom had recourse to; the modern registration Acts have practically superseded it.

CLASS III.—COMPANIES INCORPORATED OR PRIVILEGED BY
SOME SPECIAL ACT OF PARLIAMENT.

1. *Companies not incorporated, but empowered to sue and be sued.*

Companies empowered to sue and be sued.

These companies are formed by agreement, and by the Acts which privilege them (*k*). Whether a person is a member or not, depends, in the absence of any special provisions in

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| <p>(<i>e</i>) 7 Will. 4. and 1 Vict. c. 73, § 18; see, too, §§ 20 and 21.</p> <p>(<i>f</i>) See § 27.</p> <p>(<i>g</i>) See §§ 2-4 and 24.</p> <p>(<i>h</i>) See § 21.</p> <p>(<i>i</i>) See §§ 8 & 9.</p> <p>(<i>k</i>) As to companies empowered</p> | <p>by a colonial legislature to sue and be sued by a public officer, see <i>Bank of Australasia v. Harding</i>, 9 C. B. 661; <i>Bank of Australasia v. Nias</i>, 16 Q. B. 717; <i>Kelsall v. Marshall</i>, 1 C. B. N. S. 241.</p> |
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the Act of the company which may be in question, upon the principles applicable to ordinary partnerships. Bk. I. Chap. 4.
Class 3.

Banking companies governed by the general Act, 7 Geo. 4, c. 46, may be regarded as the type of companies empowered to sue and be sued, and the authorities which will be referred to hereafter, in connection with that Act (*infra*, Class IV.), may be usefully consulted upon questions arising upon special Acts of a similar description.

2. Incorporated companies.

A company incorporated by a special Act of Parliament exists as an incorporated company by virtue of that Act, and not otherwise. It is formed by the Act, and by that alone, and those only are members of the company who are made so by the Act. Companies in-
corporated by
special Act of
Parliament.

Persons associated together for the purpose of obtaining an Act of Parliament to incorporate them into a company, are not partners, although the company, when formed, will have gain for its object, and although the shareholders will divide amongst themselves whatever profits may accrue to the company (l). Promoters not
partners.

It does not fall within the scope of the present work to detail the method of obtaining Acts of Parliament, or to advert to the rules which have to be observed in compliance with the standing orders of the two Houses (m). It may, however, be observed, that before an Act can be obtained for the incorporation of a company, a deposit must be made of a certain proportion in some cases of the estimated expense of the undertaking, and in others of the capital it is proposed to raise. Formerly a contract had to be entered into by the subscribers, whereby each covenanted to pay a sum set opposite his name. This contract was commonly called the "parliamentary contract," by way of distinction from the Parliamentary
contract and
subscribers'
agreement.

(l) See *infra*, Bk. II., c. 1, and Partn. pp. 18 *et seq.*

(m) The standing orders are published annually, and reliance is not to be placed on any except the last for the time being. See on this

subject generally, Hodges on Railways, c. i. ed. 7; and as to the return of the deposit and its application in payment of debts and costs, *infra*, Bk. IV., c. 4, § 1.

Bk. I. Chap. 4. subscribers' agreement," *i.e.*, the agreement entered into by
 Class 3. — the allottees of shares for the formation of the company.

The special Act. The Act which each company may succeed in obtaining for
 itself is called its "special Act," and governs the company as
 to all matters specially provided for in it. But as to other
 matters the company (if incorporated since the 8th of May,
 1845) is governed by the Companies Clauses Consolidation
 The Companies Clauses Act. Act (*n*), which is a public general Act passed in May, 1845, and
 is applicable to every English (*o*) company incorporated by Act
 of Parliament since that time, save so far as its clauses and
 provisions may be expressly varied or exempted by the com-
 pany's special Act. In the present place it is proposed to
 notice such of the clauses of the Act in question as relate
 to the constitution of the companies to which it applies, and
 to the evidence of membership therein.

A company is supposed to be incorporated by a special Act,
 to have the amount of its capital fixed thereby, and to have
 the capital thus fixed, divided into shares of a certain number
 and amount, and numbered progressively from one upwards,
 so that each share may be distinguished by its appropriate
 number (§ 6). The company is then (by § 9) required to
 keep a book called the "register of shareholders," in which
 book are to be entered, (1), the names of the persons entitled
 to shares in the company; (2), the number of shares to which
 such persons are respectively entitled; (3), the distinguishing
 numbers of such shares; and (4), the amount of the subscrip-
 tions paid on them. This book is to be authenticated by the
 seal of the company (which is to be affixed at ordinary meet-
 ings), and is *prima facie* evidence against a person registered
 therein as a shareholder that he is so in point of fact (see § 28);
 and the creditors of the company have a right to inspect it
 (§ 36). In addition to the "register of shareholders," the
 company is required to keep a "shareholders' address book"

Register of
 shareholders.

(*n*) 8 & 9 Vict. c. 16, amended by
 26 & 27 Vict. c. 118; 32 & 33 Vict.
 c. 48; 38 & 39 Vict. c. 66; 47 & 48
 Vict. c. 43; 51 & 52 Vict. c. 48; 52
 & 53 Vict. c. 37; 55 & 56 Vict. c. 19;
 and by 57 & 58 Vict. c. 56. The

Lands Clauses and the Railways
 Clauses Consolidation Acts have no
 connection with the topics discussed
 in this treatise.

(*o*) See *Wilson v. Caledonian Rail.
 Co.*, 5 Ex. 822.

(§ 10), which is to be open to the inspection of every shareholder at all convenient times (*p*). On demand of the holder of any share, and on payment of a small fee, the company is required (§ 11) to deliver to him under its seal a certificate of proprietorship; and this certificate is (§ 12) required to be admitted in all courts as *prima facie* evidence of the title of the person named in it, and of his executors, administrators, or assigns to the share therein specified (*q*). Provision is then made for the transfer of shares, for the registry of transfers, for the payment of calls, for the forfeiture of shares for the non-payment of calls, and for executing against shareholders judgments which have been obtained against the company; all of which matters will be noticed hereafter.

Bk. I. Chap. 4.
Class 3.

Share certificate.

The statute contains two definitions of the term shareholder:—

Who are shareholders.

1. It is declared in § 3, that the word shareholder shall mean shareholder, proprietor, or member of the company; and,

2. It is declared in § 8, that every person who shall have subscribed the prescribed sum (*r*) or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company.

Upon this section it has been decided that a person may be a shareholder although he has not paid for his shares, and although payment is a condition precedent to his exercising his full rights (*s*).

As regards the entry on the register, it is to be observed:—

Effect of register.

1. The Act nowhere says that a person not on the register is not a shareholder. A person made a member by the special Act is clearly a shareholder although not registered (*t*); and it

(*p*) See as to inspection and taking copies, *infra*, Bk. III. c. 1, § 4.

(*q*) The certificate only shows the legal title. *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496. As to the effect of a mistake in the certificate, see *supra*, p. 82.

(*r*) *I.e.*, the sum prescribed in the

company's special Act. See § 2.

(*s*) *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15; and see, also, *McEuen v. West Lond. Wharves Co.*, 6 Ch. 655.

(*t*) *Portul v. Emmens*, 1 C. P. D. 201 & 664, where no shares were ever issued, and no register was ever

Bk. I. Chap. 4. is conceived that other persons may be shareholders although
 Class 3. not registered as such (u).

2. The register is *prima facie* evidence that a person whose name is on it is a shareholder.

It follows from this, that the company may put anybody's name on the register, and throw upon him the burden of showing that he is not a shareholder (x). But the register is no evidence that a person whose name is not on it is a shareholder; and therefore where shares were allotted to "Brownrigg and Taylor," who were trustees for another person and were described on the register as "Brownrigg and others," this entry was held to be no evidence against Taylor (y).

Form of register.

Wolverhampton
 New Waterworks
 Company v.
 Hawkesford.

The leading case on the requisities of a register of shareholders in companies governed by the Companies Clauses Consolidation Act, is *Wolverhampton New Waterworks Company v. Hawkesford* (z). It was there held that a sheet of paper on which were written the names of some shareholders, and the total number of shares held by them, and which paper was sealed with the seal of the company, was not a *register* at all. In this case the shares were not identified by numbers, and in this respect the register was substantially informal; and the Court relied much on this circumstance. But it would, perhaps, be going too far to hold that if a company issues unnumbered shares, and keeps a proper register of such shares, this register is altogether useless and inadmissible in evidence (a). And if the shares are numbered the register is admissible, although it does not contain the numbers of the shares (b).

kept. Compare *Kipling v. Todd*, 3 C. P. D. 350, and see *O'Brien's case*, Ir. R. 11 Eq. 422.

(u) See the last note, and *Rastrick v. Derbyshire, &c., Rail. Co.*, 9 Ex. 149, and *Wolverhampton Waterw. Co. v. Hawkesford*, 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 456.

(x) *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Bain v. Whitehaven Rail. Co.*, 3 H. L. C. 1; *West Cornwall Rail. Co. v. Mowatt*, 15 Q. B. 528.

(y) *Birkenhead, Lancashire, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426.

(z) 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 456. Compare *Portal v. Emmens*, 1 C. P. D. 201 & 664.

(a) See the last case, and *Irish Peat Co. v. Phillips*, 1 B. & S. M. 638.

(b) *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15.

A rough share book has been held inadmissible in evidence as a register under the Act now in question (c). Bk. I. Chap. 4.
Class 3.

If the register is in several volumes they are all admissible in evidence, although the company's seal is to be found in the last of them only (d); and the register sealed with the seal of the company is admissible in evidence without proof of the time or place, or authority at or by which the seal was affixed (e). Moreover, the register is, if sealed and kept substantially as required, *prima facie* evidence against any one whose name is on it, although he may prove that it has been kept irregularly, and is in many respects inaccurate and imperfect (f); but the sealed register is no evidence that a person whose name is on it was a shareholder at any given time anterior to the day on which the seal was affixed (g).

3. The register is not conclusive evidence that a person whose name is on it is a shareholder. It is competent for him to rebut the *prima facie* case made against him by the register, by showing that the company inserted his name in it without any authority. An express authority from him is not, however, requisite; for if he has entered into a contract with the promoters of the company to take shares in it, and if that contract is binding upon both parties, he may without more be properly registered as a shareholder, and the contract and the register will together be conclusive against him. But if he can show that no such contract was ever entered into, or that such a contract, if ever entered into, had terminated before his name was inserted in the register, then the *prima facie* case raised against him by it will be at an end. The following cases illustrate these propositions:

1. As to the right of the company to register those who are Right of company to register.

(c) *Birkenhead, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426; *Cheltenham, &c., Rail. Co. v. Price*, 9 C. & P. 55. 1 Man. & Gr. 448; *London and Grand Junc. Rail. Co. v. Freeman*, 2 ib. 606;

(d) *Inglis v. The Great Northern Rail. Co.*, 1 Macqueen, 112. *London and Brighton Rail. Co. v. Fairclough*, ib. 674; *Birmingham, Bristol, and Thames Junc. Rail. Co. v. Locke*, 1 Q. B. 256; *London and Grand Junc. Rail. Co. v. Graham*,

(e) *North-Western Rail. Co. v. M'Michael*, 5 Ex. 855. ib. 271.

(f) See *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15; *Bain v. Whitehaven Co.*, 3 H. L. C. 1; *Southampton Dock Co. v. Richards*, (g) *Cheltenham and Great Western Union Rail. Co. v. Price*, 9 C. & P. 55.

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Class 3.
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entitled to shares. That a person who is bound to accept shares may be properly registered as a shareholder was decided in *The Midland Great Western Railway Company v. Gordon* (h). In that case a railway company was projected; the defendant agreed to take shares in it; he executed the subscribers' agreement; and he received scrip certificates. He sold the scrip before the company was incorporated. After it was incorporated the company placed his name on the register of its shareholders, and he was held to be a shareholder, although he had never authorised the insertion of his name in the register, except so far as his contract conferred an implied authority for such insertion (i). But a person who has never agreed to take shares, and who is only the holder of scrip transferable to bearer, ought not to be registered as a shareholder against his will (k).

Improper
registry.

2. As to the inconclusiveness of the register. A person whose name is on the register is not a shareholder unless he is also entitled to a share in the company; and in order to entitle a person to a share, he must have acquired such title by the company's special Act (l), or he must have been an original subscriber for the share, or have obtained a title to it from or through an original member or subscriber. An original subscriber does not become a shareholder by being placed on the register unless he has acquired a right to be registered; and therefore if he has entered into a contract which gives him no right against the company to be considered a member thereof until he has performed certain conditions, e.g., executed a deed, he does not become a shareholder by being registered as one before he has complied with those conditions; for as the registry would not be equivalent to a

(h) 16 M. & W. 804; see, too, *Burke v. Lechmere*, L. R. 6 Q. B. 297; *Nixon v. Brownlow*, 2 H. & N. 455, and 3 ib. 686; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414.

(i) In *Kidwelly Cunial Co. v. Raby*, 2 Price, 93, an Act of Parliament, incorporating the subscribers to a company, was held to have made

the defendant a shareholder, he having been a subscriber, although, before the Act had passed, he retired from his contract so far as he lawfully could.

(k) *Eustace v. Dublin Trunk, &c., Rail. Co.*, 6 Eq. 182.

(l) As in *Portal v. Emmens*, 1 C. P. D. 201 & 664.

compliance with the conditions for one purpose, *e.g.*, as against the company if a dividend were claimed, so it is not equivalent to a compliance with them for another purpose, *e.g.*, against him who is registered, in an action for calls (*m*). Bk. I. Chap. 4.
Class 3.

A person who is not yet entitled to share dividends, is not a shareholder in the company, and does not become one by simply being put on the register, unless indeed the insertion of his name there is the only one thing remaining to be done to perfect his title (*n*).

It follows from the above that the company is not necessarily estopped by its own register (*o*). But when a person is put on the register, the company has no right to strike him off unless it can show proper grounds for so doing (*p*). Company not
estopped by its
register.

The Companies Clauses Consolidation Act contains no provision for the rectification of the register; but it may nevertheless be rectified both by mandamus and injunction as already pointed out (*q*). Correcting
register.

The doctrine by which individuals and companies are estopped by their own conduct from taking advantage of the non-performance of conditions precedent, and the non-observance of prescribed formalities, is applicable to companies of the class now in question, and to shareholders in them, as is shown by the cases of *Sheffield and Manchester Railway Company v. Woodcock* (*r*), and *Cheltenham and Great Western Railway Company v. Daniel* (*s*), which have been already noticed (*t*). Estoppel by
conduct.

Shares in companies governed by the Companies Clauses Consolidation Act are transferable by deed duly stamped, in which the consideration is truly stated; the deed when duly executed is to be delivered to the secretary of the company, whose duty it is to enter it in the register of transfers (*u*). The Transfers of
shares.

(*m*) *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282. See, also, *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598, noticed *ante*, p. 67; and *Edwards v. Kil-kenny Rail. Co.*, 14 C. B. N. S. 526.

(*n*) See *Shropshire Union Co. v. Anderson*, 3 Ex. 401. *Pidcock*, 8 Ex. 279. See also, *ante*,
p. 78 *et seq.*

(*o*) See the last case, and *Waterford, Wexford, &c., Rail. Co. v.* (*p*) *Ward v. S.-Eastern Rail. Co.*,
2 E. & E. 812. Compare *Hare v.*
Lond. and N.-W. Rail. Co., Johns.
722.

(*q*) *Ante*, p. 78 *et seq.* (*r*) 7 M. & W. 574.

(*s*) 2 Q. B. 281. (*t*) *Ante*, pp. 66 and 67.

(*u*) 8 & 9 Vict. c. 16, §§ 14 & 15. 10—2

Bk. I. Chap. 4. legal title to the shares or stock will not pass by a transfer
 Class 3. which has not been delivered to the secretary (*x*), nor by one which has been so delivered, if it has been rejected by him as not complying with the requirements of the Act, as for instance by being insufficiently stamped (*y*); nor will the legal title pass by a transfer which is not duly executed as a deed, though it has been accepted and registered by the secretary (*z*); but it would seem that if a transfer duly executed has been delivered to and accepted by the secretary the legal title will pass, although the transfer is insufficiently stamped, and does not truly state the consideration (*a*). A form of transfer is given by the Act (*b*); and in order that a company may be compelled to register an instrument of transfer, it must be in a simple form, not differing substantially from the form prescribed (*c*).

CLASS IV.—COMPANIES INCORPORATED OR PRIVILEGED BY A
 GENERAL ACT OF PARLIAMENT.

1. *Banking companies formed under 7 Geo. 4, c. 46.*

Banking companies, 7 Geo. 4, c. 46.

Banking companies governed by 7 Geo. 4, c. 46, and formed before May, 1844, still exist, but no company can now be formed under that Act (*d*). These companies are not mere partnerships, for they possess many privileges which ordinary partnerships do not (*e*). A company of this kind was formed by agreement, and the privileges alluded to were acquired by sending returns to the stamp office, of (*inter alia*) the names and residences of the members; and the names, residences, and titles of office of two or more members resident in England, who had been appointed public officers of the company, and by any one of whom the company might sue and be sued (*f*). The

(*x*) *West v. West*, 9 L. R. Ir. 121.

(*y*) *Nanney v. Morgan*, 35 Ch. D. 598, and 37 ib. 346.

(*z*) *Powell v. London and Provincial Bank* [1893], 2 Ch. 555; affirming [1893] 1 Ch. 610.

(*a*) See case in last note.

(*b*) 8 & 9 Vict. c. 16, § 14, and Sched. B.

(*c*) *Copeland v. North-Eastern Rail. Co.*, 6 E. & B. 277; *R. v. General Cemetery Co.*, ib. 415.

(*d*) 7 & 8 Vict. c. 113, § 1.

(*e*) *Powles v. Page*, 3 C. B. 16; *Macintyre v. Connell*, 1 Sim. N. S. 225 & 252.

(*f*) 7 Geo. 4, c. 46, §§ 4 & 5; an irregularity in the returns does not

returns thus made are evidence that all persons named therein as members were members at the dates of the returns in which their names appear (g). Bk. I. Chap. 4.
Class 4.

The Act contains no definition of the term shareholder or member; but it has been decided that no person is a member within the meaning of the Act unless he has complied with all the conditions necessary to constitute a person a member according to the company's deed of settlement. Thus it has been held that the husband of a married woman who, with his consent, had become a shareholder, was not himself liable to creditors as a member, he not being a member according to the company's deed (h). Who are share-
holders.

The Act requires that the returns to the stamp office shall be made out and be verified by the oath of one of the registered public officers, and shall be sent in once a year, between the 28th of February and the 25th of March (i). But it has been held that a certified copy of the return is admissible in evidence, although it may have been made out by a person calling himself "cashier," and there may be nothing to show that he was a public officer (k). It has also been held unnecessary to prove that the return was verified by the oath of a public officer, as required by the Act (l); or that the return was made at the proper time (m). On the other hand, it has been held that returns proved not to have been made in compliance with the Act are inadmissible; e.g., when it is proved that they were not made until after the 25th of March (n). Returns to the
stamp office.

A person returned as a member will, until the contrary is shown, be presumed to have been a member at the time the return was made and subsequently (o); and if two successive returns contain the name of the same person, the presumption

deprive the company of the privileges conferred by the Act. *Bonar v. Mitchell*, 5 Ex. 415.

(g) 7 Geo. 4, c. 46, § 6.

(h) *Ness v. Angus*, 3 Ex. 805; see, too, *Douglson v. Bell*, 5 Ex. 967; *Ness v. Armstrong*, 4 Ex. 21; *Bosanquet v. Shortridge*, 4 Ex. 699.

(i) 7 Geo. 4, c. 46, § 5.

(k) *Harvey v. Scott*, 11 Q. B. 92;

Field v. Mackenzie, 4 C. B. 717.

(l) *Steward v. Dunn*, 12 M. & W. 655.

(m) *Bosanquet v. Woodford*, 5 Q. B. 310.

(n) *Prescott v. Buffery*, 1 C. B. 41; compare this with the last case, where it was held that the Act was directory only in this respect.

(o) *Steward v. Dunn*, 12 M. & W.

Bk. I. Chap. 4. is strong that he was a member during the whole period
 Class 4. between the times at which such returns were made (*p*).

There is nothing in the Act which makes the returns conclusive, either one way or the other; and a person not returned as a member may be proved, not only to have become a member since the making of the last return, but to have been a member at the time of the making of that return (*q*).

The Act is silent as to the mode in which shares are to be transferred.

2. Registered companies.

By far the greatest number of joint-stock companies belong to this class. They are all now governed by the Companies Acts, 1862, 1867, 1877, 1879, 1880 (*r*), 1886, 1893, 1898 and 1900, the Companies (Memorandum of Association) Act, 1890, and, if the registered office of the company is situate in England or Wales, by the Companies (Winding up) Acts, 1890 and 1893. These Acts will be found printed in the Appendix to this work. These Acts, like those which they supersede, require for their practical working a public officer in each division of the United Kingdom. This officer (called the registrar of joint-stock companies) is appointed by, and, to a certain extent, is subject to the Board of Trade. His duty is to register the various documents required by the Acts to be registered, and to allow such documents to be inspected by any one desirous of seeing them (25 & 26 Vict. c. 89, § 174).

These duties will, if necessary, be enforced by mandamus (*s*).

Incorporation of
company.

Registration incorporates the company as from the date mentioned in the registrar's certificate of incorporation (*t*).

655; *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 106.

(*p*) *Bosanquet v. Shortridge*, 4 Ex. 699.

(*q*) See *Prescott v. Buffery*, 1 C. B. 41; *Bank of England v. Johnson*, 3 Ex. 598.

(*r*) The Companies Act, 1883, has been superseded and repealed by the Preferential Payments in Bankruptcy Acts, 51 & 52 Vict. c. 62,

and (as to Ireland) 52 & 53 Vict. c. 60; amended, except as to Scotland, by 60 & 61 Vict. c. 19.

(*s*) *R. v. Whitmarsh*, 15 Q. B. 600; see, also, *R. v. Registrar of Joint Stock Companies*, 10 Q. B. 839; *R. v. Same*, 21 Q. B. D. 131.

(*t*) §§ 18 and 191 of the Act of 1862, and § 1 of the Act of 1900, which amends § 18 and repeals § 192 of the Act of 1862.

Under the Act of 1862 the certificate of the registrar was conclusive evidence that all the statutory requisitions in respect of registration had been complied with (§§ 18 and 192) (*u*). Even, therefore, if they had not, still the existence of the company as a corporate body could not be denied in the face of the certificate (*x*); nor did the fact that a company was formed in fraud invalidate the certificate or deprive the company of its corporate character (*y*). But it had been doubted whether the requirement in § 6, that there should be at least seven signatories to the memorandum of association, was a requisition in respect of registration (*z*), and it was considered that a certificate under § 18 (*a*) was not conclusive evidence that the association in respect of which it was granted was one to which the Acts apply (*b*). Hence it was suggested that if the memorandum of association was in fact signed by six persons only (*c*), or if there was no *bonâ fide* association of seven persons (*d*), the registrar's certificate was not conclusive, and that the registration might in proper proceedings be set aside (*e*). These doubts as to the effect of the certificate are now removed, for under § 1 of the Companies Act, 1900, the registrar's certificate, whether granted before or after that Act was passed, is conclusive evidence that all the statutory requisitions in respect of registration and of matters

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Class 4.

Certificate of
registration
conclusive.

(*u*) *Peel's case*, 2 Ch. 674; *Oakes v. Turquant*, L. R. 2 H. L. 325 & 354-369; *Princess of Reuss v. Bos*, 5 ib. 176; *New Brunswick Rail. Co. v. Boore*, 3 H. & N. 249.

(*x*) See the last note, and *George Newman & Co.* [1895], 1 Ch. 674; *Glover v. Giles*, 18 Ch. D. 173; *Nassau Phosphate Co.*, 2 Ch. D. 610; *Banwen Iron Co. v. Barnett*, 8 C. B. 406; *Bird's case*, 1 Sim. N. S. 47.

(*y*) *Pilbrow v. Pilbrow's Atmospheric Co.*, 5 C. B. 440.

(*z*) *National Debenture Corporation* [1891], 2 Ch. 505.

(*a*) § 192 was differently worded, and a certificate under it was conclusive that the company was authorised to be registered. See *Ennis v. West Clare Rail. Co.*, 3

L. R. Ir. 94.

(*b*) See *Northumberland and Durham District Bank Co.*, 2 De G. & J. 357, and *Baroness Wenlock v. River Dee Co.*, 38 Ch. D. 534, which turned on similar provisions under other Acts.

(*c*) See case cited in note (*z*) and compare *Ladies Dress Association v. Pulbrook* [1900], 2 Q. B. 381. Signature by an infant was good, see *Laxon & Co. (2)* [1892], 3 Ch. 555.

(*d*) *Per Lord Davey in Salomon v. Salomon & Co.* [1897], A. C. at p. 55; see, too, *ib. p. 30*.

(*e*) *Qu.*, how this could have been done? The Act contains no provision for cancelling an improper registration, but see case in note (*d*). *Princess of Reuss v. Bos*, L. R.

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precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under the Acts. A statutory declaration made by one of the persons named in the section of compliance with these requisitions must be produced to the registrar, and he is entitled, though not bound, to accept this as sufficient evidence of such compliance (*f*).

Evidence of
incorporation.

The registrar's certificate (*g*), although the best, is not the only admissible evidence of registration. Registration may be sufficiently proved by other evidence; for example, as against the company, by the production of certificates of shares sealed with its seal (*h*). But this sort of evidence cannot be relied upon when it is necessary to prove the incorporation of the company against persons not connected with it (*i*).

Name of com-
pany.

No two companies are to be registered by the same name, or by names so similar to each other as to be calculated to deceive (§ 20) (*k*). But if a registered company is being dissolved, and it consents to the assumption of its name by another company, the latter may be registered under the name borne by the former (§ 20) (*l*). In the event of two companies being inadvertently or otherwise registered by the same name, or by two names so similar as to be calculated to

deceive, the name of the company last registered may be

5 H. L. 176, 193, 197, 202, and
Glover v. Giles, 18 Ch. D. 180.

(*f*) Companies Act, 1900, § 1, and see the forms No. 41 & 50 in the order of the Board of Trade, dated the 28th December, 1900, and form No. 51 in order dated 15th August, 1901, printed in the Appendix.

(*g*) Any certificate given by the registrar or assistant registrar is as good evidence as the original under 40 & 41 Vict. c. 26, § 6.

(*h*) *Mostyn v. Calcott Hall Mining Co.*, 1 Fos. & Fin. 334. See *Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 432, as to actions by the company. The fact of registration is there stated to have been proved, but how does not appear.

The certificate, however, was not produced.

(*i*) See *R. v. Frankland, L. & C.* 276, as to the proof required in criminal cases, and compare *R. v. Langton*, 2 Q. B. D. 296.

(*k*) See *R. v. Registrar of Friendly Societies*, L. R. 7 Q. B. 741. As to one company restraining the registering of another in a name like its own, see below.

(*l*) Advantage is taken of this when it is desired to reconstruct a registered company. The company dissolves, and a new company is formed with a new constitution, but with the same name as the old company. See *infra*, Bk. IV., c. 3.

changed (§ 20). And any registered company may change its name, with the sanction of a special resolution of its members, and the approval of the Board of Trade (§ 18). But the change of name is not complete until a new certificate of incorporation has been issued (*m*). If the resolutions authorising the change of name were irregularly passed, the registrar should, upon application, vacate the registration of the new name, and restore the old (*n*). If the company owns a trade mark which is registered under its old name, it is the duty of the comptroller-general of trade marks to substitute the new name for the old one on the register of trade marks (*o*). Bk. I. Chap. 4.
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It is further provided that such existing companies as register with limited liability, shall add the word limited to their former name (§ 188, cl. 3, and § 190). But except in cases specially provided for, a company once registered under a given name cannot require to be registered under a new name (*p*). But an unlimited company may be converted into a limited company (see the Companies Act, 1879, 42 & 43 Vict. c. 76).

A mere change of name does not affect a company's rights or obligations (§§ 18, 20, and 194). But as will be seen hereafter, the consequences of registering an existing company under the Acts are extremely important.

Any company trading in this country can restrain persons from registering another company to carry on a rival business under a name identical with or so like its own as to be calculated to deceive (*q*); so a company which has been already registered under such a name can be restrained from carrying on a rival business under it (*r*), and an injunction may even be obtained to restrain the signatories of the memorandum of association of a recently registered company from allowing it Rival companies.

(*m*) *Shackleford v. Dangerfield*, D. 678, and *La Société Anonyme des Anciens Établissements Panhard*
L. R. 3 C. P. 407.

(*n*) *Australasian Mining Co.*, et *Levassor v. Panhard Levassor*
W. N. 1893, 74. *Motor Co. Ltd.* [1901], 2 Ch. 513.

(*o*) *New Ormonde Cycle Co. Ltd.* (*r*) *Merchant Banking Co. of London v. Merchants' Joint Stock Bank*,
[1896], 2 Ch. 520. 9 Ch. D. 560; *Pinet & Cie. v. Maison*

(*p*) *R. v. Registrar of Joint Stock*, *Louis Pinet, Ltd.* [1898], 1 Ch. 179;
Cos., 10 Q. B. 839. *North Cheshire and Manchester*

(*q*) *Hendriks v. Montagu*, 17 Ch. *Brewery Co. Ltd. v. Manchester*
D. 638; *Tussaud v. Tussaud*, 44 Ch.

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to remain registered under such a name (*rr*). But an old-established foreign company cannot, in the absence of dishonesty, be restrained from carrying on business in this country in its corporate name, though it does resemble the name of an English company (*s*).

Defunct companies.

The registrar may remove from the register the name of any company which has ceased to carry on business (*t*); he has a similar power over companies which are being wound up, if no proceedings are being taken to carry on or complete the winding up (*u*).

Scope of Act of 1862.

With respect to the registration of companies under the Act of 1862, it will be found that its provisions apply, first, to all companies formed under it (*x*); secondly, to some companies existing when the Act came into operation (*y*); and, thirdly, to some companies formed subsequently to that date, but not under the provisions of the Act itself (*z*). It will further be seen that many companies may be wound up under it although not registered under it (*a*).

Registration when compulsory.

Registration is compulsory—

1. In the case of insurance companies completely registered under 7 & 8 Vict. c. 110 (see § 209 of the Act of 1862) (*b*).

2. In the case of companies which ought to have registered

Brewery Co. Ltd. [1899], A. C. 83. See further as to one company suing another for taking its name with a colourable imitation, *Lee v. Haley*, 5 Ch. 155; *Braham v. Beacham*, 7 Ch. D. 848; *Lawson v. The Bank of London*, 18 C. B. 84; *The Colonial Life Assurance Co. v. The Home and Colonial Assurance Co.*, 33 Beav. 548; *The London Assurance Co. v. The London and Westminster Insurance Corporation*, 9 Jur. N. S. 843, V.-C.S.; *The London and Provincial Law Assurance Society v. The London and Provincial Joint Stock Life Ass. Co.*, 17 L. J. Ch. 37, N. S.

(*rr*) *La Société Anonyme des Panhard et Levassor v. Panhard Levassor Motor Co. Ltd.* [1901], 2 Ch. 513. The company was formed for a fraudulent purpose, and *semble* the signa-

tories were guilty of a fraudulent conspiracy.

(*s*) *Saunders v. Sun Life Ass. Co. of Canada* [1894], 1 Ch. 537, and see *Turton v. Turton*, 42 Ch. D. 128.

(*t*) 43 Vict. c. 19, § 7.

(*u*) Companies Act, 1900 (63 & 64 Vict. c. 48), § 26. And see Bk. IV., c. 1, § 16, and *ib. c. 2, § 2*.

(*x*) See the first four parts of the Act.

(*y*) See the sixth and seventh parts of the Act.

(*z*) See § 180.

(*a*) See part eight of the Act.

(*b*) This gets rid of *London Monetary Co. v. Smith*, 3 H. & N. 543, and *Lond. and Provincial Prov. Soc. v. Ashton*, 12 C. B. N. S. 709. The first of these cases was clearly wrong.

under the repealed Acts of 1856—1858, but which were not so registered (§ 209). This class includes, 1, all companies registered under 7 & 8 Vict. c. 110, except insurance companies (*c*); 2, all chartered banking companies formed under 7 & 8 Vict. c. 113; and, 3, Scotch and Irish banking companies formed under 10 Vict. c. 75 (*d*).

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3. In the case of banking partnerships of more than ten persons, formed on or after the 2nd of November, 1862, unless formed under some other Act of Parliament, or under letters patent (§ 4).

4. In the case of companies, associations, or partnerships of more than twenty persons (*e*) formed on or after the 2nd of November, 1862 (*f*), for the purpose of carrying on any other business (except banking) for gain by the company, &c., or the members thereof, unless they are formed under some other Act of Parliament, or under letters patent, or unless they are companies engaged in working mines within and subject to the jurisdiction of the Stannaries (§ 4) (*g*).

Associations of more than twenty persons carrying on business by agents are within the Act (*h*). But persons who are only the *cestuis que trustent* of others who carry on business as principals, do not themselves carry on business within the meaning of the Act (*i*).

Carrying on
business.

What amounts to carrying on business for gain has been much discussed (*k*); and it is now settled that mutual marine insurance companies (*l*) and mutual loan societies (*m*) and

For gain.

(*c*) See 20 & 21 Vict. c. 14, §§ 26 & 27. As to insurance companies, see the cases in the last note, and *Bank of London, &c., Ins. Assoc.*, 6 Ch. 421.

Cornwall. See *ante*, p. 136.

(*d*) See 20 & 21 Vict. c. 49, §§ 4 & 5.

(*h*) See *Harris v. Amery*, L. R. 1 C. P. 148, and the next note.

(*e*) *I.e.*, twenty when formed or by subsequent increase. *Ex parte Poppleton*, 14 Q. B. D. 379.

(*i*) *Smith v. Anderson*, 15 Ch. D. 247, overruling *Sykes v. Beadon*, 11 Ch. D. 170.

(*f*) As to older companies, see *Shaw v. Simmons*, 12 Q. B. D. 117.

(*k*) See the last note and the next three.

(*g*) The jurisdiction was extended to Devonshire by 18 & 19 Vict. c. 32. The jurisdiction is now vested in the County Courts of

(*l*) *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *Ex parte Hargrove*, 10 Ch. 542.

(*m*) *Jennings v. Hammond*, 9 Q. B. D. 225; *Shaw v. Benson*, 11 Q. B. D. 563; *Ex parte Poppleton*, 14 Q. B. D. 379.

Bk. I. Chap. 4. clubs which make a trading profit out of their mem-
 Class 4. — bers (n) are within the Act; but freehold land societies are
 not (o).

Registration when impossible. Registration appears to be impossible only in the following cases, viz. :

1. In the case of companies and associations of less than seven members (§ 6).

2. In the case of companies and associations having the liability of their members limited by Act of Parliament or letters patent, and not having a capital divided into shares or a transferable stock (§ 179, cl. 1, and § 181), *e.g.*, mutual incorporated societies, and learned societies, such as the Royal Society.

3. In the case of Trade Unions (p).

4. In the case of foreign incorporated companies (q).

Railway companies.

It is very doubtful whether a railway company incorporated by Act of Parliament, and having a capital divided into shares or a transferable stock, can be registered under the Act (r); in an Irish case the Court, after a long examination of the various statutes and authorities, expressed a strong opinion that such a company might be registered under the Act (s), and it is apprehended that this is correct, though probably it was not intended. It is by no means clear what companies are railway companies within the meaning of the Companies Acts; Malins, V. C., decided that a company was not a railway company within the meaning of the Acts, unless its principal object was the construction of a railway (t); on the other hand, companies which have power to make a

(n) *R. v. Tankard* [1894], 1 Q. B. 548.

(o) *Re Siddall*, 29 Ch. D. 1.

(p) 34 & 35 Vict. c. 31, § 5.

(q) *Bulkeley v. Schutz*, 3 L. R. P. C. 764; *Bateman v. Service*, 6 App. Ca. 386.

(r) *Uxbridge v. Rickmansworth Railway Co.*, 43 Ch. D. p. 566; and compare §§ 179, cl. 1, 180 and 181.

(s) *Ennis v. West Clare Rail. Co.*, 3 L. R. Ir. 94. There was no decision on the point, for the company

was registered, and the court held themselves precluded by § 192 from going behind the registrar's certificate. See *ante*, p. 151. Whether railway companies incorporated by special Act, were within 7 & 8 Vict. c. 111, was also doubtful. See *Bright v. Hutton*, 3 H. L. C. 366; *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, *ib.* 599. Such companies were expressly excepted from the Winding-up Acts, 1848-9.

(t) *Exmouth Docks Co.*, 17 Eq. 181.

railway have been held to be railway companies within the meaning of the Railway Companies Act, 1867, although the railway is merely a subordinate and ancillary part of their undertaking (u). A tramway company is not a railway company (x).

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Companies which had been already registered under the repealed Acts of 1856—8 need not register under the Act of 1862, but they may do so; and whether they do or do not register they are subject to its provisions, except that their own regulations remain unchanged (compare §§ 176, 177, 206, 208) (y). For some purposes (see §§ 176, 177), however, a distinction is made, in the case of non-re-registration, between companies formed and registered under the Acts of 1856—1858 and those registered but not formed under them. The former class are placed substantially on the same footing as companies formed and registered under the Act of 1862, the old regulations being preserved (§§ 176 and 206); whilst the latter class are placed on the same footing as other existing companies which have registered under the Act of 1862 (§ 177).

Companies already registered under the Acts of 1856—8.

The other clauses which authorise, but do not imperatively require registration, are the 6th and the 180th. These apparently authorise any seven or more persons, associated for any lawful purpose, to form a company by registration with the exceptions above mentioned. The circumstance that the persons are foreigners and intend to carry on business abroad does not preclude registration (z).

Registration when optional.

With a few exceptions, every company capable of being registered may, at the option of its members or promoters, be registered either with or without limited liability (§§ 6 and 180); and, in the first case, with the liability limited either

Option to register with limited liability, or without.

(u) *Great Northern Rail. Co. v. Brentford and Isleworth Tramways Co.*, 13 Q. B. D. 320; *East and West India Dock Co.*, 38 Ch. D. 576; *cf. also East and West India Dock Co. v. Shaw, Savill & Co.*, 39 Ch. D. 524, a decision under the Railway and Canal Traffic Act, 1854.

(y) See *Torquay Bath Co.*, 32 Beav. 581. Of course without re-registration such a company cannot be converted from an unlimited into a limited company. See, too, *Indian Railways Act*, 1894, 57 & 58 Vict. c. 12, § 2.

(z) *Princess of Reuss v. Bos*, L. R. 5 H. L. 176, affirming *General Co. for Promoting Land Credit*, 5 Ch. D. 363.

Bk. I. Chap. 4. by shares or by guarantee (§§ 7 and 180). The exceptions
Class 4. are as follows :

1. No company, having the liability of its members limited by Act of Parliament or letters patent, can register as an unlimited company, or as a company limited by guarantee (§ 179, cl. 2).

2. No company that has not a capital divided into shares, or a transferable stock, can register as a company limited by shares (§ 179, cl. 3, and § 181). This applies to most cost-book mining companies.

3. Under the Industrial and Provident Societies Act, 1893, a society registered under that Act has limited liability, and is authorised to convert itself into a company under the Companies Acts; it is apprehended that this must be a limited company (*a*).

Further a company can be formed with limited liability, but with the liability of its directors or managers unlimited (*b*).

Having made these preliminary observations, it is proposed to consider the formation of registered companies and the evidence by which a person can be shown to be a member of them. For this purpose it is not necessary to distinguish limited from unlimited companies, but it is necessary to divide registered companies into

1. Companies formed and registered under the Act of 1862.
2. Companies registered under that Act, but not formed under it.

1. *Companies formed and registered under the Companies Act, 1862.*

Except as stated on page 156, any seven or more persons associated for any lawful purpose may form a company under this Act (§ 6). It is not even necessary that gain shall be the object of the company (*c*).

- | | |
|---|---|
| (<i>a</i>) 56 & 57 Vict. c. 39, §§ 21 & 54. | 277; to companies not having gain |
| (<i>b</i>) 30 & 31 Vict. c. 131, § 4. | for their object, <i>R. v. Whitmarsh</i> , 15 |
| (<i>c</i>) See 30 & 31 Vict. c. 131, § 23. | Q. B. 600; <i>Bear v. Bromley</i> , 18 ib. |
| No questions, therefore, can arise | 271; <i>Moore v. Rawlins</i> , 6 C. B. N. S. |
| under the Act of 1862, similar to | 289; to companies, the formation of |
| those which arose under 7 & 8 Vict. | which was commenced before 1st |
| c. 110. See as to the application of | Nov. 1844, <i>Shaw v. Holland</i> , 15 |
| that Act to projected railway com- | M. & W. 136. |
| panies, <i>Abbott v. Rogers</i> , 16 C. B. | |

A company is formed under the Act of 1862, by the registration of a memorandum of association, bearing a deed stamp, and subscribed by seven or more persons, in the presence of, and attested by one witness at least (see §§ 8—11 and 17 and 18, and the forms in sched. 2).

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Class 4.
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Memorandum of
association.

This memorandum must contain, 1, the name of the proposed company; 2, the part of the United Kingdom in which the registered office of the company is to be; and 3, the objects for which the company is to be established (§§ 8—10, and sched. 2). The objects must be specified; it would not be a compliance with the Act merely to state that the object was to carry on any business the company might think profitable (*d*). If the company is to be limited by shares, the memorandum must also state, 4, that the liability of the members is limited; and, 5, the amount of proposed capital, and the shares into which it is to be divided (§ 8 and sched. 2, form A.). If the company is to be limited by guarantee, the memorandum must contain, in addition to the three things first above mentioned, a declaration that each member will, if necessary, contribute to a specified amount on the winding up of the company (§ 9, and sched. 2, forms B. and C.); and (since 1st Jan. 1901) if it is to have a capital divided into shares, the amount of such proposed capital and the shares into which it is to be divided (*e*). If the company, whether limited or unlimited, has a capital divided into shares, each subscriber to the memorandum must write opposite his name, the number of shares he takes, and he must take one at least (§§ 8 and 14).

If the company is limited, a statement of the amount of nominal capital to be raised by shares must be sent to the registrar and be stamped with a stamp duty of 5s. per 100l. of capital (*f*).

(*d*) *Crown Bank*, 44 Ch. D. 634. See, too, *Amalgamated Syndicate* [1897] 2 Ch. 600.

(*e*) Companies Act, 1900, § 27. This was not formerly necessary. See *Malleson v. General Mineral Patents Syndicate, Ltd.* [1894], 3 Ch. 538.

(*f*) 62 & 63 Vict. c. 9, § 7; 59 &

60 Vict. c. 28, § 12; and 54 & 55 Vict. c. 39, §§ 112. A similar duty is imposed on the share capital of companies limited by letters patent or Act of Parliament otherwise than by registration under the Companies Acts, see *ib.* and 54 & 55 Vict. c. 39, § 113.

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"One man companies."

Salomon v.
Salomon & Co.

These provisions of the Act have in recent years been made use of in such a way as in effect to enable even a single individual to trade with limited liability. The process is ingenious and simple. The owner of a business gets six other persons, mere dummies and nominees of his own, to join him; these seven persons subscribe the memorandum of association for one share each often of nominal amount, and register themselves as a company with limited liability; the company thus formed purchases the business from the owner, and pays him for it in fully paid up shares; no further shares are issued, and no other members are admitted. The former owner of the business thus holds the entire share capital of the company, except the six shares held by his six nominees, and retains complete control over the business, and in effect trades for the future with limited liability (*h*). In many cases this plan is adopted in perfect good faith by the owners of large and valuable businesses (*i*), but the power of forming a limited company in this manner is obviously capable of abuse, and frequently is most grossly abused. In the opinion of the author such a proceeding was never contemplated by the Legislature. Its legality, however, was established by the decision of the House of Lords in the celebrated case of *Saloman v. Saloman & Co.* (*k*). When a company is thus formed, the virtual owner of the business cannot be made liable for debts contracted by the company after its formation; moreover, if he has obtained debentures containing a charge upon the company's assets in part payment of the purchase money for his business, he will be entitled, in respect of these debentures, to priority over the unsecured creditors of the company (*l*), unless, indeed, the sale to the company can be and is set aside for fraud, or on some other ground on

(*h*) For further details as to this method of forming companies, and as to the advantages derived from "the conversion of a business into a private company," as it is often called, see Palmer's Company Precedents (7 ed., Part 1, p. 546 *et seq.*).

(*i*) See the remarks of Vaughan Williams, J., in *Wragg, Limited* [1897], 1 Ch., p. 807.

(*k*) [1897] A. C. 22, reversing *Broderip v. Salomon* [1895], 2 Ch. 323.

(*l*) *Salomon v. Salomon & Co.*, *ubi supra*. See further as to debentures issued by such companies, *Seligman v. Prince & Co.* [1895], 2 Ch. 617; *Davies v. R. Bolton* [1894], 3 Ch. 678.

which transactions between companies and their directors or promoters can be set aside (*m*). The transfer of the business to the company may indeed be a fraud on his own directors, and be an act of bankruptcy on his part. If this be the case, and he becomes bankrupt within three months afterwards, the transfer will be void, and such of the property included in the transfer as is still in the hands of the company will vest in the trustee in his bankruptcy, and be divisible amongst his creditors, and this whether the company is being wound up or not (*n*); the transfer may also be avoided under 13 Eliz. c. 5, if the circumstances bring it within that statute (*o*).

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The memorandum of association must, in the case of an unlimited company, and of a company limited by guarantee, and may in the case of a company limited by shares, be accompanied, when registered, by articles of association, prescribing regulations for the company (§ 14, and sched. 2, forms B. and C.). These articles must be printed and be stamped with a deed stamp, and be signed by the subscribers to the memorandum of association, in the presence of, and attested by one witness at least (§§ 14 and 16). In the case of an unlimited company and before the 1st of January, 1901 (*p*), in the case of a company limited by guarantee having a capital divided into shares, the articles must state the amount of the proposed capital; and in the case of a company not having such a capital, the articles must state the number of members with which the company proposes to be registered (§ 14).

Articles of
association.

The first schedule of the Act, table A., contains a set of Table A. regulations which may be adopted, wholly or in part, by any

(*m*) See *infra*, Bk. III., c. 2.

(*n*) Bankruptcy Act, 1883, §§ 4 (b), 43, 44, & 49, *In re Carl Hirth* [1899], 1 Q. B. 613. See also *In re Carey, ex parte Jeffreys* [1895], 2 Q. B. 624; this decision was based upon reasoning which was held to be erroneous in *Salomon v. Salomon & Co.*, and if the decision can be supported, it must, it is conceived, be by the aid of 13 Eliz. c. 5, for the

transfer of the business took place more than three months before the bankruptcy.

(*o*) See *In re Carl Hirth* [1899], 1 Q. B., pp. 620, 625.

(*p*) The share capital of a company limited by guarantee must now be stated in the memorandum of association. See *ante*, p. 159.

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company, and which apply to companies limited by shares, unless the contrary is expressed in their registered articles (§§ 14 and 15). These regulations closely resemble those contained in table B., in the repealed Act of 1856. The Board of Trade has power to alter them, but not retrospectively (§ 71).

**Registration of
memorandum
and articles.**

The memorandum of association, and the articles, if any, are to be delivered to the registrar of joint-stock companies, who is required to retain and register them (§ 17). A statutory declaration by a solicitor of the High Court engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all the requisitions of the Act in respect of registration or incidental thereto, must be produced to the registrar; and he is entitled, though not bound, to accept this as sufficient evidence of such compliance (*q*). If the company issues any invitation to the public to subscribe for its shares, the applicant for registration must also deliver to him a list of the persons who have consented to be directors of the company; if the list contains the name of any person who has not so consented, the applicant is liable to a fine (*r*). Certain fees are payable upon the registration of the memorandum of association and articles (if any) (§ 17). After their registration, the registrar is required to certify that the company is incorporated, and in the case of a limited company, that it is limited; and his certificate is conclusive evidence of the validity of the registration (*s*).

**Certificate of
registration.**

**Construction of
memorandum.**

If the memorandum is expressed in unreasonably wide terms the generality of the expressions will be controlled by what on the true construction of the document appear to be the real objects or main purpose of the company (*t*); and the name of the company and perhaps also a prospectus issued when the

(*q*) Companies Act, 1900, § 1, and Form No. 41 in the Order of the Board of Trade, dated 28th Dec. 1900. In Scotland an enrolled law agent is substituted for a solicitor of the High Court. See § 34.

(*r*) *Ib.* § 2, and Form No. 50 in the Order of the Board of Trade. If there is no such list, see Form 51 in the Order dated 15th August, 1901.

Any person occupying the position of a director is a director within the Companies Act, 1900, by whatever name he is called (§ 30).

(*s*) *Ante*, p. 151.

(*t*) *Crown Bank*, 44 Ch. D. 634; *Amalgamated Syndicate* [1897], 2 Ch. 600; *Warburton v. Huddersfield Industrial Society* [1892], 1 Q. B. 817.

company first came into existence may be considered for the purpose of ascertaining what the real objects are (u). Bk. I. Chap. 4.
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The memorandum of association and the articles of association ought to be consistent with each other, and they ought, if possible, to be construed so as to make them consistent (x). If the memorandum is ambiguous, or silent on a matter which the Act does not require to be stated therein, contemporaneous articles may be looked at to explain its meaning or to control or rebut an inference which might otherwise be drawn from its silence (y). But if the two conflict, the articles must give way to the memorandum, for that is the more important document of the two, and cannot be altered except in certain particulars specified in the statutes (z) or under the provisions of the Companies Memorandum of Association Act, 1890 (a). Many cases illustrating this general rule will be met with hereafter when considering the powers of directors and majorities, and the liabilities of the subscribers of the memorandum (b). Moreover, articles of association, which are inconsistent with the Companies Acts, are invalid (c). Construction of
memorandum
and articles.

The articles of association may be varied by special resolution (§ 50), and the company cannot deprive itself of its power to alter them (d). But as will be seen hereafter, the power is subject to certain limitations (e). Varying articles
of association.

The Act in substance declares that the subscribers of the memorandum of association (§§ 18 and 23) (f), and all persons Who are mem-
bers.

(u) *Crown Bank*, 44 Ch. D. 634. Act, 1867, § 5 of the Companies Act, 1877, the Companies Act, 1879, and § 29 of the Companies Act, 1900.

Sed qu.: as to the prospectus see *Thomas Edward Brinsmead & Sons* [1897], 1 Ch. p. 45; *Morrison v. Chicago, &c., Granaries Co.* [1898], 1 Ch. 263. (a) See, *infra*, Bk. III., c. 1, § 4 (3).

(x) See *Felgate's case*, 2 De G. J. & Sm. 456; *Anderson's case*, 7 Ch. D. 75; *South Durham Brewery Co.*, 31 Ch. D. 261. (b) See particularly *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349; *Ashbury Rail. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Dent's case*, 8 Ch. p. 776.

(y) *Fisher v. Black and White Publishing Co.* [1901], 1 Ch. 174; *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; *London Financial Assoc. v. Kelk*, 26 Ch. D., pp. 133-5. (c) *Trevor v. Whitworth*, 12 App. Ca. 409, and other cases noticed, *infra*, Bk. III., c. 1, § 4 (3).

(z) See § 12 of the Companies Act, 1862, §§ 8, 9, & 21 of the Companies Act, 1867, § 5 of the Companies Act, 1877, the Companies Act, 1879, and § 29 of the Companies Act, 1900. (d) *Walker v. London Tramways Co.*, 12 Ch. D. 705.

(e) *Infra*, Bk. III., c. 1, § 4 (3).

(f) Signature by an agent is

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Deceased
members.

who have agreed to become members and whose names are entered in the register of members, shall be deemed members of the company (§ 23). For some purposes, *e.g.*, the liability to calls (*g*) or the right to receive a dividend (*h*) or to be offered shares in new capital under Art. 27, Table A. (*i*), or for service of notices if the company does not know of his death (*j*), a deceased member, whose name remains on the register, or his estate, is considered as still a member.

Subscribers of
memorandum.

It is very difficult to see how any person who signs the memorandum of association can be held not to be a member. But in *Felgate's case* (*k*), a person who had signed the memorandum and articles of association was held not to be a contributory, as the articles he had signed had been tampered with before they were registered. He was held not to be bound by the articles, and not being bound by them he was held not bound by the memorandum (*sed quere*).

Other members.

With respect to other persons it is to be observed that no particular form of agreement is necessary (*l*); but a question may arise on this Act, as on the Companies Clauses Consolidation Act, whether a person may not be a member although his name is not on the register. In considering this question regard must be had to the right of companies to put persons on the register (*m*), to the provisions for its rectification (*n*),

sufficient, *Whitley Partners Limited*, 32 Ch. Div. 337. As to signature of a copy of the memorandum of association under the Act of 1856, see *New Brunswick Rail. Co. v. Boore*, 3 H. & N. 249.

(*g*) *Baird's case*, L. R. 5 Ch. 725; *James v. Buena Ventura Nitrate Grounds Syndicate* [1896], 1 Ch. 456, p. 467.

(*h*) *Bombay Burmah Trading Corp. v. Smith*, L. R. 21 Ind. Ap. 139; referred to [1896], 1 Ch. 456.

(*i*) *James v. Buena Ventura, &c.*, Syndicate [1896], 1 Ch. 456.

(*j*) *Ib.*, pp. 465, 467. *New Zealand Gold Extraction Co. v. Peacock* [1894], 1 Q. B. 622; but if known to be dead, see *Allen v. Gold Reefs of*

West Africa, Ltd. [1900], 1 Ch. 656, varying *ib.* [1899], 2 Ch. 40.

(*k*) 2 De G. J. & S. 456. This case turned on the Act of 1856, but there does not appear to be any difference between that Act and the Act of 1862, so far as this subject is concerned, unless the registrar's certificate now concludes the matter. See *supra*, p. 151. Compare *Lyons' case*, 35 Beav. 646.

(*l*) This gets rid of *New Brunswick Rail. Co. v. Mugeridge*, 4 H. & N. 160 & 580. See *Boj Lead Mining Co. v. Montague*, 10 C. B. N. S. 481.

(*m*) *Ante*, p. 63.

(*n*) §§ 35 & 98.

and to the extent to which a person may have acted and been treated as a member (*o*). Bk. I. Chap. 4.
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There is nothing in the statute to prevent the existence of two or more classes of members (*p*), but as will be seen hereafter (in Book III.) the rights of each class must be respected, and this consideration may prevent the creation of another class with special privileges. Several classes
of members.

It is illegal for a company limited by guarantee, and not having its capital divided into shares, if registered after the 31st December, 1900, to give any person a right to participate in the divisible profits of the company otherwise than as a member (*q*).

A certificate under the seal of the company, stating that any shares or stock are held by a member, is *prima facie* evidence of his title to the shares or stock therein specified (§ 31) (*r*). Certificate of
title.

Every company registered under the Act is bound to keep at its registered office (§ 32) a register of its members, and a duplicate of any colonial register which it may keep under the provisions of the Companies (Colonial Registries) Act, 1888 (*s*). The register must contain the names and addresses, occupations, and the number of the shares, if any, held by the members, and the amounts paid, or agreed to be considered as paid, in respect of such shares, and the dates at which the members were registered, and the dates at which they ceased to be members (§ 25). No notice of any trust is to be entered on the register (§ 30) (*t*). The register is *prima facie* evidence of all matters directed or authorised to be inserted therein (§ 37) (*u*). Register of
members.

The 35th section provides for the rectification of the register, and is extremely important (*x*). Its effect is that if the name Correction of
register, § 35.

(*o*) *Ante*, pp. 65 *et seq.*

(*p*) *Winstone's case*, 12 Ch. D. 239, where there were shareholders and assurance members not shareholders.

(*q*) Companies Act, 1900, § 27 (3), such companies as that in question in *Malleon v. General Mineral Patents Syndicate, Ltd.* [1894], 3 Ch. 538, can no longer be formed.

(*r*) The right to demand this certificate is not given by the Act, but

only by Table A., Nos. 2 and 3. See as to these certificates, *ante*, p. 82.

(*s*) 46 & 47 Vict. c. 30.

(*t*) See as to this, *Bradford Banking Co. v. Briggs*, 12 App. Ca. 29.

(*u*) See, as to the register when fully paid-up shares have been replaced by share warrants transferable by delivery, 30 & 31 Vict. c. 131, § 31.

(*x*) See on the correction of registers generally, *ante*, pp. 78 *et seq.*

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Correction of
register under
§ 35.

of any person is without sufficient cause entered in or omitted from the register of members, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, he or any member of the company or the company itself may obtain an order for the rectification of the register. The order may be obtained from any division of the High Court; or in the case of a colonial register from any competent court in the colony where such register is kept (*y*). The application in the High Court should be made by motion (*z*).

A difference of opinion has been expressed, and apparently still exists, as to the correct interpretation of this section. Some consider that under it the register may be rectified whenever it can be shown by any person who is on or off the register himself that some other person ought as between themselves to be in his place (*a*); whilst others consider that the section does not admit of so wide an interpretation, being confined to the cases specified in its commencement (*b*), viz.:—

1. To cases where the name of a person is without sufficient cause entered in or omitted from the register.

2. To cases where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

The more restricted interpretation, it will be observed, renders the section inapplicable except where the company fails in discharging the duty imposed upon it of keeping a proper register.

It must be borne in mind that before a company is being wound up its register is much more readily rectified than after the winding up has commenced and the rights of creditors have to be considered (*c*). If the company is being wound up

(*y*) 46 & 47 Vict. c. 30, § 3 (3).

(*z*) *Duffin v. Mexican Gold and Silver Ore Reduction Co.*, W. N. 1890, p. 116.

(*a*) See *Ex parte Shaw*, 2 Q. B. D. 463; *Ward and Garfit's case*, 4 Eq. 189; *Musgrave and Hart's case*, 5 Eq. 193; and the judgment of Turner, L. J., in *Ward and Henry's*

case, 2 Ch. 431.

(*b*) *Ex parte Ward*, L. R. 3 Ex. 180; *Shepherd's case*, 2 Ch. 16; and see Lord Cairns' judgment in *Ward and Henry's case*, 2 Ch. 431; *Marino's case*, 2 Ch. 596.

(*c*) *Ex parte Sandys*, 42 Ch. D., pp. 114, 115.

compulsorily, an application cannot be made under this section without the leave of the Court (*d*). The rectification of the register in connection with the settlement of the list of contributories will be considered hereafter; in the present place those decisions only will be referred to which relate to the rectification of the register of a going company.

The 35th section not only authorises the correction of mistakes but also the determination of important conflicting rights, going further in this respect than the corresponding section of the Companies Act, 1856 (*e*). As however trusts are not noticed (§ 30) the title to be investigated is the legal title or the right to acquire it (*f*). If this legal title is clear, and there is no difficult question of fact to be investigated, the Court will rectify the register without directing an action to be brought (*g*); but the Court has a discretion as to whether it will interfere summarily under the Act or direct an action, and will be guided by the nature of the facts in dispute and by the desirability of having them investigated by a jury (*h*). And if there is an equity against the applicant the Court will probably not exercise its power under this section (*i*). The circumstance, however, that the company has itself rectified the register does not preclude the Court from ordering it to be rectified; an order of the Court being often of great importance to the applicant (*k*).

Registers will be rectified at the instance of persons who have been registered as members without having entered into any contract to take shares (*l*), so where the contract they have

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Instances of
rectification.

(*d*) § 87, in *Re Onward Building Soc.* [1891], 2 Q. B. 463.

(*e*) As to which, see *British Sugar Refining Co.*, 3 K. & J. 408.

(*f*) *Ex parte Sargent*, 17 Eq. 273; *Ex parte Parker*, 2 Ch. 685. And see *Simpson v. Molson's Bank* [1895], A. C. 270.

(*g*) *Ex parte Shaw*, 2 Q. B. D. 463.

(*h*) See the last case; *Askew's case*, 9 Ch. 664, where an action was directed to try a question of fraud; *Simpson's case*, 9 Eq. 91, where a bill

was directed to be filed. The difficulty here mainly turned on the construction of documents, and *qu.* the advantage of directing an action in such a case.

(*i*) See *per* Cotton, L. J., in *Cowley & Co.*, 42 Ch. D., p. 233, and *Trevor v. Whitworth*, 12 App. Cas. at p. 440.

(*k*) *Martin's case*, 2 Hem. & M. 669.

(*l*) *Los' case*, 6 N. R. 327; *Higg's case*, 2 H. & M. 657; *Martin's case*, ib. 659, where the name had been removed already; *Baily's case*, 5 Eq.

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entered into is void (*m*) ; so where the contract being voidable it has been duly avoided by the alleged shareholder. Thus registers have been rectified where a person who has signed an underwriting letter, which does not amount to a contract to take shares, has been put on the register in respect of them (*n*), so where qualification shares have been allotted to a late director who ought to have taken them but had not agreed to do so (*o*), so where the allotment on the application is void for irregularity (*p*) ; so where persons have taken shares on the faith of a prospectus with which the company's memorandum of association does not correspond (*q*) ; so where a person applied for shares on the faith of particular persons named in the prospectus being directors, and such persons refused to become directors (*r*) ; so where a person has been induced by the fraud or misrepresentation of the company to become a member (*s*). So where the company refuses to register a transferee, to whom the company cannot object (*t*), or a company declines to act on a vesting order under the Trustee Acts (*u*).

Again, where shares are transferred to an infant the infant can have the register rectified whilst he is an infant (*x*), or on his coming of age, providing he has not accepted the shares (*y*) ;

428 ; 3 Ch. 592 ; *Somerville's case*, 6 Ch. 266, 271.

(*m*) *Stace and Worth's case*, 4 Ch. 682.

(*n*) *Ex parte Stark* [1897], 1 Ch. 575.

(*o*) *Ex parte Cammell* [1894], 2 Ch. 392. And see further as to qualification shares, Bk. IV., c. 1, § 13, sub-sec. 6.

(*p*) *Ex parte Smith*, 39 Ch. D. 546 ; *Portuguese Consolidated Copper Mines, Ltd.*, 42 Ch. D. 160, and *infra*, Bk. II., c. 2, § 1, as to irregularity in proceedings of directors.

(*q*) *Stewart's case*, 1 Ch. 574 ; *Webster's case*, 2 Eq. 741 ; *Downes v. Ship*, L. R. 3 H. L. 343 ; and *Ship's case*, 2 De G. J. & Sm. 544 ; *Breckenridge's case*, 2 Hem. & M.

642. See *ante*, pp. 22 *et seq.*

(*r*) *Anderson's case*, 17 Ch. D. 373.

(*s*) *Karberg's case* [1892], 3 Ch. 1, *ante*, p. 95 ; *Smith's case*, 2 Ch. 604, and 4 H. L. 64 ; *Pawle's case*, 4 Ch. 497 ; *McNiell's case*, 10 Eq. 503 ; *Fox's case*, 5 Eq. 118.

(*t*) See *Cawley & Co.*, 42 Ch. D. 209 ; *Ex parte Parker*, 2 Ch. 685, and *infra*, Bk. III., c. 4, § 5, Transfer of shares.

(*u*) *New Zealand Trust and Loan Co.* [1893], 1 Ch. 403 ; as to the correct form of such orders, see, too, *In re Gregson* [1893], 3 Ch. 233 ; *In re C. M. G.* [1898], 2 Ch. 324.

(*x*) See *Mann's case*, 3 Ch. 459 n. ; *Capper's case*, *ib.* 458.

(*y*) See *Hart's case*, 6 Eq. 512 ; *Wilson's case*, 8 Eq. 240.

and the company itself can obtain an order rectifying the register in such cases (z) if it has not accepted the infant as a shareholder knowing the facts (a). So where a person has by misrepresentation or fraud induced the company to register him as a shareholder, the register will be rectified at the instance of the company, if it applies promptly (b), and if third parties have not dealt with the person registered and have not acquired rights on the faith of his being a shareholder (c).

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There are numerous instances in the books of the rectification of the register under this section when shares have been issued as fully paid up without any contract, or any sufficient contract, having been filed to meet the requirements of § 25 of the Companies Act, 1867, with the result that the persons on the register were liable to pay for their shares in cash (d). In such cases the register was rectified by removing the names of the holders of the shares, and the shares were subsequently reissued to them after a proper contract had been filed (e). This procedure was superseded by the Companies Act, 1898 (f), and § 25 has now been repealed by the Companies Act, 1900, and "no proceedings under" that section can now be taken—this, it is presumed, means that no proceedings for enforcing payment in respect of such shares can be taken in cases where the proceedings could not succeed if § 25 had not been enacted (g).

In the case of
fully paid-up
shares.

It is unlawful for a company limited by shares to issue shares at a discount; if they are so issued, the allottee is liable to pay the amount of the discount in cash (h). If, therefore, a

Shares issued at
a discount.

(z) See *Symon's case*, 5 Ch. 298.

(a) *Parson's case*, 8 Eq. 656.

(b) See *Ex parte Kintreu*, 5 Ch. 95.

(c) See, as to this, *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584, and other cases of that sort noticed *ante*, p. 71. Compare *Askew's case*, 9 Ch. 664, where an action was directed.

(d) See for instance *Ex parte Shorr*, 18 Eq. 16; *Darlington Forge Co.*, 34 Ch. D. 522; *Ex parte Menzies*, 43 Ch. D. 118. In granting such relief terms might be imposed for the protection of creditors. *Preservation*

Syndicate [1895], 2 Ch. 768. See further *infra*, Bk. III., c. 3, § 1. 3.

(e) The order should not direct the reissue of the shares. *Maynard's Limited* [1898], 1 Ch. 515.

(f) 61 & 62 Vict. c. 26. See *infra*, note at end of Bk. III., c. 3, § 1.

(g) § 33. See the note to that section in Mr. Clauson's supplement to the 7th ed. of Buckley on the Companies Acts, and *infra*, Bk. III., c. 3, § 1.

(h) *Ooregum v. Roper* [1892], A. C. 125, and *infra*, Bk. III., c. 3, § 1.

Bk. I. Chap. 4. Class 4. person agrees to take shares at a discount and he is registered in respect of them, he may, if he comes promptly, get the register rectified by the removal of his name on the ground that he never agreed to take shares with a liability to pay the amount of the discount upon them (*i*); but he cannot do so if, knowing his name to be on the register, he has acted as a shareholder in respect of the shares, although he was at the time ignorant of the legal consequences of holding them (*k*).

Vendor and purchaser.

The question whether a vendor or a purchaser of shares is entitled to be registered in respect of them can also be determined upon an application to rectify the register (*l*).

Application to rectify refused.

On the other hand, a duly registered member cannot have his name struck off the register (*m*); and no person is entitled to have his name put on the register until he has complied with all conditions precedent, *e.g.*, proved his title to his shares in the manner required by the company's regulations (*n*); and where a company is required to register a transfer of shares on which it has a lien, that lien must be first discharged (*o*), provided the debt which gives rise to the lien was in existence when the transfer was sent to the company for registration (*p*). If the company is being wound up by order of the Court, the Court will not, except upon strong grounds, rectify the register by substituting a transferee, to whom shares have been transferred since the winding up commenced, in place of his transferor (*q*). Neither can a person who was entitled to be on the register have it rectified in his favour if he has allowed some one else to be registered in his place, and such person has transferred his share to a *bonâ fide* purchaser (*r*); and as will be seen hereafter, under

(*i*) *Almadu Tirito Co.*, 38 Ch. D. 415. See also case in next note. But see Mr. Justice Buckley's remarks in his work on the Companies Acts, 7th ed., p. 609.

(*k*) *Ex parte Sandys*, 42 Ch. D. 98.

(*l*) *Ex parte Shaw*, 2 Q. B. D. 463. See, too, *Stewart's case*, 1 Ch. 574.

(*m*) *Ex parte Ward*, L. R. 3 Ex. 180.

(*n*) *East Wheal Martha Mining Co.*, 33 Beav. 119.

(*o*) See *London, Birmingham, &c., Bank*, 34 Beav. 332; *Stockton Mal-leable Iron Co.*, 2 Ch. D. 101.

(*p*) That is, in the absence of any special bargain or provision in the company's regulations; see *Cawley & Co.*, 42 Ch. D. 209.

(*q*) *Onward Building Soc.* [1891], 2 Q. B. 463.

(*r*) *London and Provincial Telegraph Co.*, 9 Eq. 653.

the head "Contributories," delay in applying to the Court is often fatal to the application (s). A company which has, when prosperous, persistently refused to register a person, cannot obtain an order to register him when the company is in difficulties (t). So too where persons who had surrendered their shares to the company, had for a long time treated the surrender as valid, the Court refused their application to be restored to the register, although the surrender was invalid, and the company was willing that their application should be granted (u).

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If a person has suffered damage by reason of a company improperly excluding him from or retaining him on its register, the company will be ordered to pay it (x). If he is entitled to repudiate his shares, and has paid any money to the company in respect of them, the Court will, on removing his name from the register, order the return of the money (y) with interest (z). But the company will not be liable to pay any special damage arising from unusual circumstances of which it had no notice (a), nor, it seems, can damages be given unless an order for rectification is made (b).

So long as the company is a going concern, the Court has apparently no jurisdiction under the 35th section, to order costs to be paid by any one except by the company (c). But this observation does not apply to the costs of an appeal (d).

If the application is made after the liquidation has commenced, the Court has jurisdiction to order costs to be paid as it may think fit (e).

(s) See *Scottish Petroleum Co.*, 23 Ch. D. 413.

(t) See *Sichell's case*, 3 Ch. 119; *Nicol's case* and *Tufnell and Ponsonby's case*, 29 Ch. D. 421.

(u) *Bellerby v. Rowland and Marwood's Steamship Co.* [1901], 2 Ch. 265.

(x) *New Quebrada Co.*, 36 L. J. Ch. 903.

(y) *Almadu and Tirito Co.*, 38 Ch. D. 415.

(z) *Kurberg's case* [1892], 3 Ch. 1, noticed *ante*, p. 95.

(a) *Skinner v. City of London Marine Ins. Corp.*, 14 Q. B. D. 882.

(b) *Otto's Kopje Diamond Mines, Ltd.* [1893], 1 Ch. 618. The Court, by the consent of the parties, gave damages in this case, though no order for rectification was made.

(c) *Ex parte Sargent*, 17 Eq. 273; *Ex parte Kintrea*, 5 Ch. 95.

(d) *Ex parte Shaw*, 2 Q. B. D. 463.

(e) See *Ex parte Kintrea*, 5 Ch. 95. In *Anderson's case*, 17 Ch. D. 373, and in *Wood's case*, 15 Eq. 236,

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Stannaries.

The jurisdiction conferred by this section on the Vice-Warden of the Stannaries to rectify the register of companies within the district of the Stannaries, does not exclude the jurisdiction of the High Court for the same purpose (*f*). The jurisdiction of the Vice-Warden is now vested in the County Court of Cornwall (*g*).

Notice of an order rectifying the register must in most cases be given to the registrar (*h*).

Correction of
register on
winding up of
company.

By § 98 of the Act of 1862 it is provided that when a company is being wound up, the Court winding it up shall have power to rectify the register of members; and this power is constantly acted upon (*i*). In determining who are contributories, the actual state of the register is therefore of much less importance than the state in which it ought to be.

Correction of
register by
company.

A company can correct its own register where a Court would compel it to do so (*k*), but the power must be exercised with caution (*l*).

Inspection of
register.

Every person, whether a member or not, has a right to inspect the company's register, and to have a copy of it, or of any part of it, on payment of a small fee (§ 32); but he is not entitled personally to make extracts from or copies of the entries without payment or, it is conceived, upon payment of the fee (*m*). Every member is entitled to inspect the register gratis; other persons may be required to pay one shilling (§ 32). But these provisions do not apply to a company in liquidation (*n*). The register may be temporarily closed (§ 33).

Observations on
register.

The Act does not expressly require the register to be sealed with the company's seal; and a book kept as required by § 25

the company was ordered to pay costs as between solicitor and client.

(*f*) *The Penhale and Lomar, &c.*, Co., 2 Ch. 398.

(*g*) See *ante*, p. 136.

(*h*) § 36.

(*i*) No special application to rectify the register is necessary in these cases; *Breckenridge's case*, 2 Hem. & M. 642. The power conferred by § 98 is not more extensive than that conferred by § 35. See *Sichell's case*, 3 Ch. 119; *Reese River*

Co. v. Smith, 1. R. 4 H. L. 64, and *infra*, Bk. IV., c. 1, § 13. 1.

(*k*) *Hartley's case*, 18 Eq. 542, and 10 Ch. 157; *Etna Ins. Co.*, 1. R. 7 Eq. 264.

(*l*) See *ante*, p. 80.

(*m*) *Balaghat Gold Mining Co.* [1901], 2 K. B. 665, overruling *Boord v. African Consolidated Land and Trading Co.* [1898], 1 Ch. 596.
(*n*) *Kent Coalfields Syndicate* [1898], 1 Q. B. 754.

may, it is conceived, be evidence under § 37, though not sealed (o). Bk. I. Chap. 4.
Class 4.

In addition to the register of members above referred to, every company having a capital divided into shares is bound under penalties to keep in a separate part of its register of members, and once a year at least to make out and transmit to the registrar of joint-stock companies, a list of its members and late members, and a summary showing the amount of the company's capital, and the number of shares into which it is divided, and the number of shares issued and forfeited, and the amount of calls made, received and unpaid (§§ 26 and 27, and sched. 2, form E.) (p); and the total amount of debt due from the company in respect of all mortgages and charges which require registration under the Companies Act, 1900, or would require such registration if created after 31st December, 1900 (q), and the names and addresses of its directors; the summary is to be so framed as to distinguish between shares issued for cash and shares issued otherwise than for cash or only partly for cash (r); the list and summary must be signed by the secretary or manager (Companies Act, 1900, §§ 19 and 28) (rr). And every company, whether its capital is divided into shares or not (s), is bound to keep at its registered office a register of its directors and managers, and to send a copy of such register to the registrar of joint-stock companies, and to notify all changes amongst them to him (Act of 1862, §§ 45 and 46) (ss). When share warrants transferable to bearer have been issued under the Companies Act, 1867, the annual return must be varied as required by that Act (t). And when any company has reduced its capital under the Companies Act, 1880, the annual return must contain the particulars required by sect. 6 of that Act (u).

(o) See *Cornwall, &c., Mining Co. v. Bennett*, 5 H. & N. 423, and see *ante*, pp. 75 *et seq.*

(p) See as to these sections and as to the powers of magistrates under § 27, *Briton Medical and General Life Assoc.*, 39 Ch. D. 61; *Gibson and Barton*, 10 L. R. Q. B. 329.

(q) See as to this § 14, and *infra*, Bk. II., c. 5, §§ 3 and 4. 4.

(r) See as to the particulars to be

stated in the returns after allotment of shares by companies limited by shares, Companies Act, 1900, § 7.

(rr) See also Form No. 6b in the Order of the Board of Trade dated 28th Dec., 1900.

(s) Companies Act, 1900, § 20.

(ss) See Form No. 9 in the Order referred to in note (rr).

(t) See 30 & 31 Vict. c. 131, § 32.

(u) 43 Vict. c. 19, § 6.

Bk. I. Chap. 4. These documents when registered are open to the inspection
 Class 4. of every one on payment of a small fee (Act of 1862, § 174, cl. 5 ;
 Inspection. see also as to their inspection, § 32).

2. *Companies registered under the Companies Act, 1862, but not formed under it.*

Little need be said with respect to the formation of companies which may be registered under the Act of 1862, but which are not formed under its provisions. Such companies, if created already, must have been formed either under Acts now repealed, or in one of the various methods which have been considered in preceding pages ; and companies, if created hereafter, but not under the Act, must, as the law at present stands, be formed in one or other of the same methods, that is to say, under some special Act of Parliament, or under a royal charter or letters patent, or, if for working mines in Cornwall or Devonshire, on what is called the cost-book principle.

It is apprehended that if seven or more persons associated together merely by agreement wish to be incorporated under the Act, they must be registered as a company formed under the Act under § 6, and not under § 180, as an existing company ; it is doubtful whether any company, other than a cost-book mining company, formed merely by agreement, can now be registered as an existing company under § 180 ; and it has been decided that a new company formed by agreement, not for carrying on business, but simply for the purpose of being incorporated under the Act and then wound up, cannot be registered under that section (*x*).

It has been already seen that registration, under the Act, of companies not formed under it, is in some cases compulsory, in some impossible, and in others optional (*y*). With respect to existing companies which are required to register, and which omit so to do, the consequences of non-registration are serious ; for, first, such companies cannot sue (*z*) ; secondly, no dividends

(*x*) *R. v. Registrar of Joint Stock Co., Ex parte Johnston* [1891], 2 Q. B. 598. the case of the *Waterloo Insur. Co.*, 31 Beav. 586, that an insurance company could not petition to be wound up before it was registered.

(*y*) *Ante*, pp. 154 *et seq.*

(*z*) Accordingly it was held in

can be lawfully paid to their shareholders; and, thirdly, each of their directors becomes liable to a penalty of 5*l.* per day (§ 210) (a). Bk. I. Chap. 4.
Class 4.

Companies not formed under the Act but capable of being registered under it, may, subject to certain restrictions and qualifications (see §§ 179—188) (b), be registered either with or without limited liability (§ 180); and such liability, if limited, may be limited either by guarantee or by shares (§ 180) (c). Registration of
existing com-
panies with
limited liability.

Every company when registered becomes incorporated under the Act (§ 191). The incorporation, however, does not deprive the company of its property or acquired rights (§ 193), nor discharge it from its debts or other liabilities (§ 194) (d). But after registration no execution upon a judgment against the company can be issued against its members (§ 195). The creditors, therefore, of an existing company must, after its registration, proceed to wind up the company, if they cannot obtain payment of their debts by execution against the property of the company (e). Effect of
registration.

Upon compliance with certain requisitions mentioned in the Act, and which need not be here specified (see §§ 109, 179, and 183—8), the registrar is required to certify that the company is incorporated under the Act, and in the case of a

(a) A company required to register under the Act by § 209, and registered accordingly, is in the same position as if it had been registered voluntarily, *Ramsay's case*, 3 Ch. D. 388.

(b) § 182 is repealed, and a substituted section enacted by the Companies Act, 1879, 42 & 43 Vict. c. 76, § 6.

(c) A company registered as unlimited may be afterwards registered as limited under the Companies Act, 1879.

(d) See *Groux's Soap Co. v. Cooper*, 8 C. B. N. S. 800, where a surety to a company registered under 7 & 8 Vict. c. 110, and registered with limited liability under

18 & 19 Vict. c. 133, was held not to be discharged by such registration.

(e) The effect of registration on the liabilities of members will be considered hereafter. It has been held that § 194 does not affect the question who ought to be contributories on the winding up of the company, *Fountain's case*, 11 Jur. N. S. 553; and that § 195 does not prevent a shareholder in a cost-book mining company, who had retired before the registration, from being sued in respect of a debt contracted whilst he was a shareholder; *Lanyon v. Smith*, 3 B. & Sm. 938; *Harvey v. Clough*, 2 N. R. 204. As to what companies cannot register, see *ante*, p. 156.

Bk. I. Chap. 4. limited company, that it is limited (§ 191); and his certificate
Class 4. is conclusive evidence of the validity of the registration (*f*).

Change of name. An existing company cannot, apparently, change its name on registration, except by adding the word "limited" to its former name. (Compare § 183, cl. 3, and § 190.) After registration, however, it has the power of changing its name as if it were formed under the Act. See §§ 12, 13, 20, and 196 (*g*).

Membership in these companies. The question who is a member in a company registered, but not formed under the Act of 1862, depends upon the constitution of the particular company, and must be determined upon the principles which have been already considered (see § 196). With respect, however, to companies governed by the repealed Acts of 7 & 8 Vict. c. 110, 7 & 8 Vict. c. 113, and 19 & 20 Vict. c. 47, it may be useful to add a few observations.

7 & 8 Vict. c. 110. Companies formed under 7 & 8 Vict. c. 110, were incorporated by registration, but before being so incorporated they passed through a preliminary state, viz., that of provisional registration, the object of which was to enable the public to ascertain the nature and objects of the proposed company and the persons who projected it. Provisional registration did not incorporate the company or its promoters (*h*), nor did it affect their liability for each other's acts (*i*). A certificate of complete registration was necessary to form and incorporate the company; and before this could be obtained a deed of settlement containing certain covenants and particulars specified by the Act was required to be executed by at least one-fourth of the subscribers to the company. The certificate of complete registration was conclusive evidence that all the requisitions of the Act had been duly complied with (*k*). The Act defined a shareholder to mean any person entitled to a share, and who

(*f*) See, as to this certificate, *ante*, p. 151, and note that the repealed § 192 expressly made the certificate conclusive evidence that the company was authorised to be registered as a limited or unlimited company as the case might be. *Seem*, a certificate under the Act of 1900 has the same effect.

(*g*) See as to changing name, *ante*, p. 153; and as to becoming limited,

see the Companies Act, 1879.

(*h*) See *R. v. Whitmarsh*, 14 Q. B. 803.

(*i*) See *Reynell v. Lewis*, and *Wylde v. Hopkins*, 15 M. & W. 517; *Walstab v. Spottiswoode*, *ib.* 501.

(*k*) *Banwen Iron Co. v. Barnett*, 8 C. B. 406; *Bird's case*, 1 Sim. N. S. 47; *Pilbrow v. Pilbrow's Atmospheric Co.*, 5 C. B. 440.

had executed the deed of settlement or a deed referring to it; and it was held that no person was a shareholder who had not executed such deed (*l*). Bk. I. Chap. 4.
Class 4.

Chartered banking companies were formed under the repealed Act of 7 & 8 Vict. c. 113, by letters patent and a deed of settlement set forth in it. This Act contained no definition of the word shareholder, but persons whose names were returned as shareholders to the stamp office pursuant to the Act were *prima facie* liable as shareholders (*m*). Chartered bank-
ing companies.
7 & 8 Vict.
c. 113.

Companies were formed under the Acts of 1856-8, as under the Act of 1862, by registration. Under 19 & 20 Vict. c. 47, § 19, every person who had accepted shares in a company formed under it, and whose name was entered in the company's register, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) was a shareholder; and § 20 in effect declared that a transferor of a share should be deemed a shareholder until the transferee was registered in his place. These enactments may still be important. Moreover, notwithstanding the repeal of the Act of 1856, the regulations contained in table B. in the schedule to that Act still apply to those companies which were subject to them when the Companies Act, 1862, was passed (see § 206). These regulations, therefore, must be consulted in order to decide who is or is not a member of such companies; and as regards other companies registered under the Act of 1856, attention must be paid to their regulations, deeds of settlement, charters, &c. (*n*). Joint Stock
Companies Act,
1856.

LIFE ASSURANCE COMPANIES.

Any person or persons corporate or unincorporate not being registered under the Friendly Societies Acts (*o*) who

- (*l*) See *ante*, pp. 61 *et seq.* *v. Muggeridge*, 4 H. & N. 160 and 580, and *Boy Lead Mining Co. v. Montague*, 8 Jur. N. S. 310, noticed *ante*, p. 63, note (*p*).
- (*m*) *Dossett v. Harding*, 1 C. B. N. S. 524; *Powis v. Harding*, ib. 551; *Thompson v. Harding*, ib. 555; *Fry v. Russell*, 3 ib. 665; *Powis v. Butler*, ib. 645, and 4 ib. 469; *Daniell v. Royal Brit. Bank*, 1 H. & N. 681; *Henderson v. Royal Brit. Bank*, 7 E. & B. 356.
- (*n*) See *New Brunswick Rail. Co.*

(*o*) See the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), and the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), which repealed the former Acts.

Bk. I. Chap. 4. issue or are liable under policies of assurance (*p*) upon human life in the United Kingdom, or who grant annuities upon human life in the United Kingdom, is a company within the Life Assurance Companies Acts, 1870, 1872, and 1896 (*q*). These companies can be formed in any of the ways already mentioned, but however formed they will be subject to the provisions of the Life Assurance Acts as well as to the provisions of the Act (if any) under which they are formed. The provisions of the Life Assurance Companies Acts which relate to the matter dealt with in this chapter are briefly summarised below.

Deposit.

Every company established in the United Kingdom after the 9th August, 1870—the date of the passing of the Life Assurance Companies Act, 1870—and every company established out of the United Kingdom which after that date commences business within the United Kingdom, must pay a deposit of 20,000*l.* into the Chancery Division of the High Court of Justice (*r*).

The registrar of joint stock companies may not issue a certificate of incorporation until the deposit has been made (*s*). The deposit may be paid by the subscribers of the memorandum of association in the name of the company, and will become part of the assets of the company upon its incorporation (*t*). The deposit forms part of the company's life assurance fund until it be returned to the company (*u*), which is to be done as soon as its life assurance fund, accumulated out of premiums, has amounted to 40,000*l.* (*x*). The Board of Trade may make rules with respect to the payment, repayment, and investment of the deposit (*y*). These rules will be found in the Appendix.

(*p*) See *Newbold Friendly Soc. v. Barlow* [1893], 2 Q. B. 128.

(*q*) 33 & 34 Vict. c. 61, § 2.

(*r*) *Ib.*, § 3, and the Supreme Court of Judicature Act, 1873, §§ 33 & 34, the Supreme Court of Judicature (Funds) Act, 1883, § 2, and Daniell's Chancery Practice (6th ed.), p. 2255.

(*s*) 33 & 34 Vict. c. 61, § 3.

(*t*) 35 & 36 Vict. c. 41, § 1.

(*u*) *Ib.* If the company carries on any business besides life assurance, the life assurance fund has to be kept distinct. See 33 & 34 Vict. c. 61, § 4, and 35 & 36 Vict. c. 41, § 2.

(*x*) 33 & 34 Vict. c. 61, § 3.

(*y*) 35 & 36 Vict. c. 41, § 1.

Every company which is not registered under the Companies Acts, and which has not incorporated in its deed of settlement § 10 of the Companies Clauses Consolidation Act, 1845, must keep a "shareholders' address book" in accordance with the provisions of that section (*z*). Every company not registered under the Companies Acts must keep a sufficient number of printed copies of its deed of settlement (*a*). Every shareholder and policy holder is entitled to a copy of the shareholders' address book and of the deed of settlement on payment of the prescribed fee (*b*).

The Board of Trade may direct documents required by the Act, or certified copies thereof, to be deposited with the registrar of joint stock companies or other officer of the Board of Trade (*c*). Such documents are open to inspection by any person on payment of the proper fee, and copies may be procured (*d*). All documents deposited under the Act with the Board of Trade or the registrar, or copies certified by them, are receivable in evidence (*e*). Penalties are imposed on the company for non-compliance with the Act (*f*), and any person who signs any document required by the Act which is to his knowledge false in any particular is liable to fine or imprisonment (*g*).

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Document to
be deposited.

(*z*) 33 & 34 Vict. c. 61, § 12.

(*a*) *Ib.*, § 13.

(*b*) *Ib.*, §§ 12 & 13

(*c*) *Ib.*, § 16.

(*d*) *Ib.*, § 16.

(*e*) *Ib.*, § 17.

(*f*) *Ib.*, §§ 18 & 20.

(*g*) *Ib.*, § 19.

CHAPTER V.

OF ILLEGAL COMPANIES.

SECTION 1.—WHAT COMPANIES ARE ILLEGAL.

Bk. I. Chap. 5.
Sect. 1.

It has been said that unincorporated joint-stock companies with transferable shares are illegal at common law, first, because the privilege of having transferable shares can only be acquired by charter from the Crown or by an Act of Parliament; and, secondly, because all such companies are dangerous, mischievous, and, in short, public nuisances. But this view cannot, the writer thinks, be supported. The question has now only an historical interest, and the following note on the subject is reprinted for the convenience of those who may desire information on the subject.

Note on the Bubble Act.

In order to investigate this subject properly, it is necessary to advert to the celebrated "Bubble Act" of 1719, and the decisions upon it, for although that Act is repealed, the discussions to which it gave rise are constantly referred to when the illegality at common law of joint-stock companies is alleged or denied. The Bubble Act^(a) was levelled more particularly at—

1. The acting or presuming to act as a corporate body.
2. The raising or pretending to raise transferable stock.
3. The using of charters for purposes not warranted by them.
4. The formation of dangerous and mischievous companies, tending to the grievance of the subjects of this realm.

(a) 6 Geo. 1, c. 18, § 18. In the first two editions this Act was printed at length, but it is omitted now for the sake of gaining space. The Act was repealed by 6 Geo. 4, c. 91. The earliest reported decision on the Bubble Act is *R. v. Caywood* or *Caywood*, 2 Ld. Raymond, 1361, and 1

Str. 472, but that case throws no light on any question of present importance, as it merely relates to the punishment to be inflicted on a person found guilty of an infringement of the Act. See as to the history of this Act, Collyer on Partnership, p. 722, ed. 2.

1. With respect to acting or presuming to act as a body corporate, it was held in *R. v. Webb* (b) that having a committee, general meetings, and power to make bye-laws, was not unequivocally assuming to act as a body corporate; but in the later case of *Josephs v. Pebrer* (c) the Court was of a different opinion. To create transferable shares in a common stock has also been said to amount to assuming to act as a body corporate, although only such bodies corporate as are specially empowered so to do can lawfully possess stock, the shares in which are transferable (d). Bk. I. Chap. 5.
Sect. 1.
Assuming to act
as a corporation.

2. With respect to transferable stock it was held that any company not incorporated and specially empowered to possess such stock was illegal, if it professed to have its stock divisible into shares transferable from one person to another without restriction (e). But it was held that, if the shares were not thus transferable, their transfer being restricted to such person as should be approved by a committee, and as should enter into some special agreement (f), or to persons already members of the company (g), the company was not necessarily illegal. A scheme for establishing a tontine the shares in which were to be transferable after a certain time, was held not to be illegal, the scheme having failed before the time arrived (h). And where a railway company, the shares in which were to be transferable, was projected, and the projectors issued scrip, but resolved that nothing further should be done without the authority of Parliament, it was held that the project was not illegal (i). Transferable
shares.

3. To use charters for purposes not authorised by them was clearly illegal, not only by the Act, but at common law. This ground of illegality does not, however, appear to have been made the subject of any decision on the Act now in question. Using charters
improperly.

4. Lastly, with respect to the general ground of illegality, for being mischievous, and tending to the grievance of the subjects of this realm. In *R. v. Doll* (k) it was held that a company with transferable shares based upon a prospectus which declared that no person could be accountable beyond the amount of the shares for which he should subscribe, was illegal, on the ground that this was a mischievous delusion, calculated to ensnare an unwary public. In *R. v. Webb* (l) it was held that a company, the

Tendency to
mischief.

Rex v. Dodd.

Rex v. Webb.

(b) 14 East, 406.

(c) 3 B. & C. 639. Adopting a name which necessarily denotes a corporation is assuming to act as a corporation. *R. v. Whitmarsh*, 14 Q. B. 803. So is the assumption and use of a common seal. *Cooch v. Goodman*, 2 Q. B. 580. These cases were not decided on the Bubble Act, and do not show that an unincorporated society which assumes to act as a corporation is illegal.

(d) See *Duvergier v. Fellowes*, 5 Bing. 248.

(e) *Buck v. Buck*, 1 Campb. 547 ;

R. v. Stratton, ib. 549, note ; *Josephs v. Pebrer*, 3 B. & C. 639.

(f) *R. v. Webb*, 14 East, 406 ; *Pratt v. Hutchinson*, 15 ib. 511.

(g) Per Lord Eldon, in *Filison v. Bignold*, 2 J. & W. 510.

(h) *Nockells v. Crosby*, 3 B. & C. 814.

(i) *Kempson v. Saunders*, 4 Bing. 5.

(k) 9 East, 516, and see *Blundell v. Winsor*, 8 Sim. 601.

(l) 14 East, 406. This is the leading case on the Bubble Act, and is well worthy of attentive perusal.

Bk. I. Chap. 5. shares in which were transferable, but not without restriction, was not
Sect. 1. necessarily mischievous; and the jury having found that the company was
in fact rather beneficial than otherwise, the company was held to be legal.
As regards the important question, how far the mere raising transferable
stock was, *per se*, an offence against the Act, the Court inclined to think that
it was not, unless the company had in fact a mischievous tendency (*m*).
In *Josephs v. Pebrer* (*n*), a company, with shares transferable without
restriction, was held to be clearly mischievous, particularly because the
shares were sold at a very considerable premium. Abbott, C. J., thought
that this tended to introduce gaming and rash speculation to a ruinous
extent, to the grievance of numbers of his Majesty's subjects.

Such are the leading decisions on this celebrated Act. Juster views of
political economy, and of the limits within which legislative enactments
should be confined, have led to the repeal of the statute in question,
which, though deemed highly beneficial half a century ago, probably gave
rise to much more mischief than it prevented. But the repeal of the Act
still leaves room for the contention that companies of the nature described
in the Act are illegal at common law. This question is one of present
importance, especially in the colonies, and requires therefore careful
consideration.

Opinion of Lord Eldon. Lord Eldon, who certainly had a great aversion to companies, seems to
have been of opinion, in *Kinder v. Taylor* (*o*), that companies with large
capitals, arising from numerous small contributions, and with transferable
shares, were injurious to the public, and were illegal, independently of the
Bubble Act. The same opinion was expressed by the Court of Common
Pleas, in a case which arose after the repeal of that Act (*p*), and also by the
Vice-Chancellor Shadwell, on a still later occasion (*q*). In none of these
cases, however, was it necessary to decide this question. In *Duvergier v.*
Fellowes (*r*), the company was formed for an illegal purpose, viz., the work-
ing of a patent which could not be lawfully transferred to more than five
persons, and this was the ground relied on by the Court of Appeal. In
Blundell v. Winsor (*s*) the Vice-Chancellor thought that there was held out
to the public a false and fraudulent representation calculated to ensnare
the unwary, viz., a representation that any shareholder when he transferred
his shares ceased to be liable to the debts of the company; and he relied
on this as a ground of illegality. Although, therefore, in each of these
cases the Court was of opinion that the company was illegal, inasmuch as
it trespassed upon the prerogative of the Crown by assuming to do that
which cannot be lawfully done without special authority, there were addi-
tional circumstances rendering it unnecessary to decide on this ground

(*m*) See, too, *Nockells v. Crosby*, 3
B. & C. 814; *Pratt v. Hutchinson*,
15 East, 511; *Brown v. Holt*, 4
Taunt. 587.

(*n*) 3 B. & C. 639.

(*o*) Coll. on Part. 917, ed. 2.

(*p*) *Duvergier v. Fellowes*, 5 Bing.
248; affirmed 10 B. & C. 826, and 1
Cl. & Fin. 39.

(*q*) *Blundell v. Winsor*, 8 Sim. 601.
(*r*) 5 Bing. 248, and 10 B. & C.
826, and 1 Cl. & Fin. 39.

(*s*) 8 Sim. 601. This case can-
not be supported. See *Harrison v.*
Heathorn, 6 Man & Gr. 81. In
Blundell v. Winsor there was not in
fact any such holding out as supposed
by the Vice-Chancellor.

alone. In *Walburn v. Ingilby* (t) Lord Brougham declined to declare an unincorporated joint-stock company, with transferable shares, illegal; although the deed of settlement stated that provision was to be made, in all engagements to be entered into by the directors, that no shareholder should be liable beyond the amount of his share, and his lordship thought this clause was nugatory. In *Garrard v. Hardey* (u) it was held that an unincorporated joint-stock company, which had assumed the name of "The Limerick Marble and Stone Company," and had a capital of 50,000*l.*, divisible into 500 transferable shares, was not illegal at common law. It was in this case declared that the raising and transferring of stock in a company could not be held to be in itself an offence at common law. In *Harrison v. Heathorn* (x), a similar conclusion was arrived at. In this case the company's deed of settlement provided that a person ceasing to be a shareholder should be entitled to a certificate declaring him discharged from all liabilities on account of the shares formerly held by him. This was, in fact, the same company as was held to be illegal by Vice-Chancellor Shadwell in *Blundell v. Winsor*, which, though not overruled on appeal, can scarcely be supported after the decision in *Harrison v. Heathorn*.

Bk. I. Chap. 5.
Sect. 1.

Walburn v.
Ingilby.

Garrard v.
Hardey

Harrison v.
Heathorn.

Attempts have also been made to induce the Courts to declare scrip companies (*i.e.*, unincorporated companies with shares transferable by delivery) to be illegal at common law (y). But these attempts have been unsuccessful. The case of *Blundell v. Winsor*, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench; nor has it ever been followed.

Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or Act of Parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the Courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her Majesty's subjects. The legality at common law of such companies may therefore be considered as finally established.

It is not easy to arrive at any other conclusion if the question is examined without reference to the decisions which have been noticed. For

Observations on
the illegality of
companies with
transferable
shares.

1. It is not illegal for persons, however numerous, to enter into an ordinary contract of partnership (yy).
2. It is not illegal for all those persons to agree that one of them shall

(t) 1 M. & K. 61, and Cooper, *temp.* Brougham, 270.

(u) 5 Man. & Gr. 471.

(x) 6 Man. & Gr. 81. See, too, *Sheppard v. Ozenford*, 1 K. & J. 491.

(y) See *Ex parte Barclay*, 26 Beav. 177; *Ex parte Aston*, 27 Beav. 474,

and 4 De G. & J. 320; *Ex parte Grisewood*, 4 De G. & J. 544. As to the effect of the Act of 1862 on these companies, see *infra*, p. 185.

(yy) See now Companies Act, 1862, § 4, *infra*, p. 185.

Bk. I. Chap. 5. retire, and that a person who is not a member of the firm, but who is
 Sect. 1. willing to become one, shall take his place.

3. It is not illegal for partners, however numerous, to agree once for all that any partner who is willing to retire shall be at liberty so to do, and to introduce in his place any person selected by himself.

4. It is not illegal for an out-going partner of a firm established on this last principle, to retire in favour of an in-coming partner, upon any terms to which they both agree, provided those terms are not themselves illegal.

5. It is not illegal for an out-going and in-coming partner to agree that the latter shall pay the former more or less than he himself paid when he entered the firm.

6. It is not illegal for the members of a partnership to assume a name (z), and to agree that the management of its affairs, both external and internal, shall be entrusted to a select few, and that those few shall have the power to make rules which the others will obey.

If these propositions are assented to, it will, it is conceived, be found impossible to establish the illegality at common law of unincorporated joint-stock companies with transferable shares (a).

To say that such a partnership is illegal, because it assumes to act as a corporation, is untrue; for none of the above acts are characteristic of corporations. What distinguishes corporations from other bodies is their independent personality; and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation. Besides this it is by no means clear that it is illegal at common law to assume to act as a body corporate (b).

To assert that unincorporated companies with transferable shares are mischievous and dangerous, and therefore illegal, is to assert a proposition the truth of which has not yet been established, and which therefore cannot be admitted as the basis of a judicial inference. This ground of illegality would probably not have been relied upon so much had it not been for the technical rules of pleading which required all the members of a firm, however numerous, to be made defendants to actions and suits against the firm. This rule undoubtedly created difficulties in dealing with large bodies of persons unless they were incorporated; but if the question is reduced to this, viz., whether the rule, or a company to which it is inapplicable, most deserves to be characterised as mischievous, the question must surely be answered in favour of the company and against the rule. The rule, however, being established as law, the judges felt bound to adhere to it, and then finding it difficult to deal with unincorporated companies, declared them mischievous and illegal. The difficulty presented by the rule in question has been to a great extent removed by the Judicature Acts and rules made under them.

(z) *Ante*, p. 183. See the qualification in p. 181, note (c).

(a) See *Walburn v. Ingilby*, Cooper, *temp.* Brougham, 270.

(b) See 6 Man. & Gr. 107, where Tindal, C. J. says, "I am not aware

that presuming to act as a body corporate was an offence at common law." As to assuming a corporate name and using a corporate seal, see *ante*, p. 181, note (c).

Assuming an unincorporated joint-stock company not to be illegal at common law, it remains to be considered whether it is rendered illegal, by statute, if not registered.

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Effect of non-
registration.

The Companies Act, 1862, is extremely important in this respect, for the 4th section says imperatively that no company, association, or partnership, shall be formed after the 2nd of November, 1862, except as therein mentioned. From this it follows that companies, associations, and partnerships required to register under that section, are illegal if not registered (c). In this respect the Act of 1862 differs from the Companies Acts of 1856 and 1857 (d), and resembles the older Acts of 7 & 8 Vict. c. 110, and c. 113 (e).

Companies Act,
1862.

There are strong grounds for contending that by this section all unincorporated building societies consisting of more than twenty members which were certified after 1856 under the Building Societies Act, 1886, became illegal on the repeal of that Act by the Building Societies Act, 1894 (f).

Companies formed before the 2nd of November, 1862, and required by the Companies Act, 1862, to register under it, are not illegal, although the consequences of non-registration are severe (see § 210).

The question whether scrip companies formed since the Act of 1862 are illegal, has not yet been determined (g); but it is

Scrip com-
panies.

(c) See acc. *Ex parte Day*, 1 Ch. D. 699; *S. Wales Atlantic Steamship Co.*, 2 Ch. D. 763; *Ex parte Hargrove*, 10 Ch. 542; *Harris v. Amery*, L. R. 1 C. P. 143; *Jennings v. Hammond*, 9 Q. B. D. 225; *Shaw v. Benson*, 11 Q. B. D. 563; *Ex parte Poppleton*, 14 Q. B. D. 379; *Smith v. Anderson*, 15 Ch. D. 247, overruling *Sykes v. Beadon*, 11 Ch. D. 170; *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *In re Siddall*, 29 Ch. D. 1; *R. v. Tankard* [1894], 1 Q. B. 548, all noticed *ante*, p. 155.

(d) See 20 & 21 Vict. c. 14, § 3, and c. 49, § 5.

(e) As to which see *O'Connor v. Brudshaw*, 5 Ex. 882, as to banks; and as to other companies, *Butt v.*

Monteaux, 1 K. & J. 98; *Sheppard v. Oxenford*, ib. 491. The 7 & 8 Vict. c. 110, did not apply to companies formed before the passing of the Act. *Ex parte Aston*, 27 Beav. 474, and 4 De G. & J. 320; and see *Womersley v. Merritt*, 4 Eq. 695.

) *Ilfracombe, &c., Building Society* [1901], 1 Ch. 102; 57 & 58 Vict. c. 47, § 25. The repeal took effect from 25th August, 1896, as to societies certified after 1856.

(g) The point was discussed in *The Gen. Co. for the Promotion of Land Credit*, 5 Ch. 363, and *Princess of Reuss v. Bos*, L. R. 5 H. L. 176. It is tolerably plain that shares not paid up in full cannot be made transferable to bearer.

Bk. I. Chap. 5. of great practical importance, and before deciding it attention
Sect. 1. must be paid not only to the precise language of the Act, but
also to the difference between agreements to form companies
and partnerships and companies and partnerships which are
actually formed (*h*). Scrip companies are not, in the writer's
opinion, illegal at common law (*i*).

The only other statutes to which it may be useful to allude
in the present connection are those relating to bankers (*k*).

Bankers.

By 7 & 8 Vict. c. 32, § 21 (*l*), all bankers are required on
the first day of January, in every year, to make a return to the
stamp office of their names, residences, and occupations, or in
the case of a company or partnership, of the name, residence,
and occupation of every member of the company or partner-
ship, and in default a penalty of 50*l.* is inflicted. Upon this
Act a question might arise as to the legality of a banking
partnership, or company, composed in part of members whose
names are not returned.

By two statutes, which have since been considerably modi-
fied, it was made unlawful for banking firms of more than six
members, to issue in London or within sixty-five miles thereof,
notes payable on demand, or within six months after date (*m*).

(*h*) See Partn., p. 15 *et seq.*

(*i*) *Ante*, p. 183.

(*k*) As to marine insurers, see
Partn. p. 105.

(*l*) §§ 8 & 29 of this Act, and parts
of §§ 9 & 23, are repealed by 37 & 38
Vict. c. 96.

Issue of notes.

(*m*) 39 & 40 Geo. 3, c. 28, § 15 ;
7 Geo. 4, c. 46. See *Broughton v.*
Manchester and Salford Waterworks
Co., 3 B. & A. 1 ; *Bank of England*
v. Anderson, 3 Bing. N. C. 589 ;
Bank of England v. Booth, 2 Keen,
466 ; and on appeal, *Booth v. Bank*
of England, 6 Bing. N. C. 415 ; and
7 Cl. & Fin. 509. By a subsequent
Act (9 Geo. 4, c. 23) the right to
issue bills and notes payable on
demand was extended to all bankers
(except within London or three
miles thereof), provided they ob-
tained a licence and gave a security,

as required by the Act. By 3 & 4
Will. 4, c. 83, § 2, it was made law-
ful for banking firms of more than
six persons to issue notes payable in
London through an agent, or to draw
bills or notes upon any agent in
London, payable on demand or
otherwise, in London, and for any
less amount than 50*l.* Then the
legislature retraced its steps, confer-
ring by the Act of 3 & 4 Will. 4,
c. 98, certain privileges on the Bank
of England, and enacting (§ 2) that
during the continuance of those
privileges no banking firm of more
than six persons should issue in
London, or within sixty-five miles
thereof, bills or notes payable on
demand, with a proviso, as to firms
carrying on business beyond that
limit, in favour of bills and notes,
payable through an agent in London,

Upon these statutes, it was held, that a banking company of more than six persons, associated for the purpose of issuing notes payable on demand, or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London (*u*). Upon a similar statute relating to Ireland (*o*), it was held, that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the

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Bankers.

and for not less than 5*l*. Then by the Bank Charter Act of 1844 (7 & 8 Vict. c. 32, §§ 10 & 11), it is enacted that no person, other than a banker, who on the 6th of May, 1844, was lawfully issuing his own bank-notes, shall issue any bank-notes in any part of the United Kingdom; and that it shall not be lawful for any banker to issue in England and Wales bills or notes payable to bearer on demand; except that it shall be lawful for any banker who was, on the 6th of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank-notes under the authority of a licence, to continue to issue such notes to the extent and under the conditions mentioned in the Act; and by § 26, it is made lawful for banking firms, though of more than six members, carrying on business in London, or within sixty-five miles thereof, to draw, accept, or endorse bills not payable to bearer on demand. Such is the state of the law on this subject at the present time. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by bankers who were lawfully issuing them before May, 1844, under a licence; but by no other bankers; and not,

therefore, by any banking firm of Issue of notes.

more than six persons carrying on the business of bankers within sixty-five miles of London. In other words there are three limits: (1.) London and three miles round, in which the Bank of England has an exclusive monopoly. (2.) The district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3.) The district more than sixty-five miles from London in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844. Sections 23 & 24 of the Bank Charter Act provide for the payment by the Bank of England of annual compensation to certain bankers for the loss of the privilege of issuing their own bank-notes. This right to compensation will be lost if a bank entitled thereto ceases to carry on business, *e.g.*, by transferring its business to a joint-stock company. *Prescott, Dimsdale, &c., Ltd. v. Bank of England* [1894], 1 Q. B. 351. See further on this subject the note to the Cos. Act, 1862, sched. 3, part 2, in the Appendix; *A.-G. v. Birkbeck*, 12 Q. B. D. 605.

Compensation
for loss of right
to issue notes.

(*n*) *Ransford v. Copeland*, 6 A. & E. 482.

(*o*) 6 Geo. 4, c. 42, § 10.

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formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business within that limit for the whole time alleged (*p*). The statutes in question, moreover, have been held only to affect partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business.

By an Act which prior to 1857 regulated joint-stock banks in England (7 & 8 Vict. c. 113, § 1), it was not lawful for any company of more than six persons to carry on the trade or business of bankers in England under any agreement or covenant of co-partnership made or entered into on or after the 6th of May, 1844 (*q*), unless by virtue of letters patent to be granted by her Majesty according to the provisions of that Act. Any banking company therefore formed since May, 1844, and not under letters patent, was altogether illegal if its members were more than six in number (*r*). But the law on this head has been altered by 20 & 21 Vict. c. 49, and by the Companies Act, 1862. The combined effect of those Acts apparently is that banking companies of ten or more members formed between May, 1844, and November, 1862, must be registered unless formed under letters patent, but are not illegal by reason of non-registration (*s*), and banking companies of ten or more members formed since November, 1862, must be registered, and are illegal if not registered (*t*).

Chemists.

An incorporated company may carry on business as chemists and druggists if the persons who actually sell and dispense drugs are duly licensed so to do (*u*). The principle of the decision which settled this is applicable to other licensed trades and businesses.

(*p*) *Hughes v. Thorpe*, 5 M. & W. 656.

(*q*) See *Wigan v. Fowler*, 1 Stark. 459; *Perring v. Dunston*, Ry. & M. 426.

(*r*) See *O'Connor v. Bradshaw*, 5 Ex. 882. Compare this case with *R. v. Whitmarsh*, 15 Q. B. 600.

(*s*) See 20 & 21 Vict. c. 49, §§ 4,

5 & 12, and the Companies Act, 1862, § 205, and sched. 3, and the note thereto in the Appendix.

(*t*) Companies Act, 1862, § 4, and ante, p. 155.

(*u*) *Pharmaceutical Soc. v. London and Provincial Supply Assoc.*, 5 App. Ca. 857, and 5 Q. B. D. 310; reversing 4 ib. 313.

A company formed to acquire and work a concession conferring the exclusive right of conducting lottery loans in Persia is not an illegal company under the Lottery Acts (x). Bk. I. Chap. 5.
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Lottery Acts.

A company coming within the definition of a moneylender in the Moneylenders Act, 1900, must register itself and carry on business in accordance with the requirements of the Act. If it fails to do so it is exposed to severe penalties (§ 2), but its business is not illegal. Moneylenders
Act.

SECTION II.—CONSEQUENCES OF ILLEGALITY.

If a company, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in *Duvergier v. Fellowes* (z), that a bond for the payment of money upon the formation by the obligee of an illegal company was invalid. Consequences
of illegality.

It does not, however, follow that because an agreement to form a company is illegal, those who subscribe to its formation cannot recover back their subscriptions. If money is paid by A. to B. to be applied by him for some illegal purpose, it is competent for A. to require B. to hand back the money if he, B., has not already parted with it (a), and the illegal purpose Effect of illegality on the
right to recover
back subscrip-
tions.

(x) *Macnee v. Persian Investment Corporation*, 44 Ch. D. 306; see 9 Geo. 1, c. 19, and 6 & 7 Will. 4, c. 66.

(z) 5 Bing. 248; 10 B. & C. 826; and 1 Cl. & Fin. 39. See, also, *Williams v. Jones*, 5 B. & C. 108.

(a) See *Taylor v. Lendy*, 9 East, 49; *Barclay v. Pearson* [1893], 2 Ch. 154, a decision under the Lottery Act, and *Varney v. Hickman*, 5 C. B. 271; *Diggles v. Higgs*, L. R. 2 Ex. D. 422; *Hampden v. Walsh*, 1 Q.

B. D. 189; *Taylor v. Bowers*, ib. 291; *O'Sullivan v. Thomas* [1895], 1 Q. B. 698; *Strachan v. Universal Stock Exchange* (No. 2) [1895], 2 Q. B. 697, where the plaintiff failed, the money having been appropriated to meet his losses; *Burge v. Ashley & Smith, Ltd.* [1900], 1 Q. B. 744, decisions under the Gaming Acts; compare *Carney v. Plimmer* [1897], 1 Q. B. 634, which turned on the Gaming Act, 1892.

Bk. I. Chap. 5. has not been carried out (b). Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby (c), they have a right to have their subscriptions returned; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented.

Actions for
account.
Sheppard v.
Oxenford.

In *Sheppard v. Oxenford* (d), a company was started for working mines in Brazil. The members subscribed each a certain sum and received a sort of scrip certificate specifying the number of shares to which each was entitled. Mines, buildings, plant, and shares were bought, and at a meeting of the subscribers the defendant and another were appointed sole directors and trustees of the property of the association. Disputes having arisen, a bill was filed against the defendant (his co-trustee being dead) by one of the shareholders on behalf of himself and the others for an account of the monies received and paid by the directors, and of the debts of the association, and for payment of those debts out of the assets, and for a division of the profits among the shareholders, and for an injunction to prevent the defendant from selling the property, and for a receiver. It was contended that the company was illegal, and that no relief could be given; but it was held that the defendant as trustee could not dispute the trust on which

(b) Compare *Great Berlin Steamboat Co.*, 26 Ch. D. 616; *Herman v. Jenchner*, 15 Q. B. D. 561; *Wilson v. Strugnell*, 7 Q. B. D. 548; and the cases in the last note.

(c) See *Harvey v. Collett*, 15 Sim. 332. Compare the cases in the next note.

(d) *Sheppard v. Oxenford*, 1 K. & J. 491. See, too, *Butt v. Monteaux*, ib. 98; *Sharp v. Taylor*, 2 Ph. 801;

Symes v. Hughes, 9 Eq. 475; *Taylor v. Bowers*, 1 Q. B. D. 291. If in these cases the companies were really illegal, they must be regarded as modifying the general proposition, that a court of equity will not assist a person to get back property which he has transferred to another for some illegal purpose. See *Brackenburg v. Brackenburg*, 2 J. & W. 391; *Groves v. Groves*, 3 Y. & J. 163.

he had accepted the property; and a demurrer to the bill was overruled and a receiver and manager was appointed (c). Bk. I. Chap. 5.
Sect. 2.

If a company is illegal, shares in it cannot be recognised, and contracts for the sales of such shares are themselves illegal. Therefore, a broker employed to buy shares in an illegal company cannot recover the price he may have paid for them from the person for whom he bought them (f); nor can the buyer, if he has paid the broker, and the shares have been bought, recover back any part of the money so paid, although the broker may have been guilty of a fraudulent overcharge (g). But if the purchaser of the shares has paid the broker for them, the broker cannot retain the money against the seller (h). Sales of shares
of an illegal
company.

Again, as a contract for the sale of shares in an illegal company is itself illegal, it follows that a purchaser of such shares, who may have paid for them, cannot recover back his money if it should ultimately turn out that the company is no company at all, but a project which has failed (i).

Again, if a company is illegal it cannot maintain any action in respect of any transaction tainted with illegality. For example, an illegal company cannot prove in liquidation proceedings for a debt due to it (k), nor can the trustee of an illegal loan society recover on promissory notes given by the borrowing members to secure the repayment of the money advanced to them by the society (l). Actions, &c.
by companies.

Again, as no Court will lend its assistance towards carrying out an illegal transaction, a member of an illegal association which is regulated by a trust deed cannot maintain an action to have the trusts administered by the Court nor compel the trustees to pay damages for any breach of trust (m).

(c) Compare *Sykes v. Beadon*, 11 Ch. D. 170; and other cases noticed *infra*, note (m).

(f) *Josephs v. Pebrer*, 3 B. & C. 639. The illegality in this case was apparently treated as obvious.

(g) *Buck v. Buck*, 1 Camp. 548.

(h) *Bousfield v. Wilson*, 16 M. & W. 185. See, also, *Nicholson v. Gooch*, 5 E. & B. 999; *Tenant v. Elliott*, 1 Bos. & P. 3, and Partn. p. 115.

(i) *Kempson v. Saunders*, 4 Bing. 5.

(k) *Ex parte Day*, 1 Ch. D. 699. Compare *Ex parte Poppleton*, 14 Q. B. D. 379, where a company after registration sued in respect of matters which occurred before.

(l) *Shaw v. Benson*, 11 Q. B. D. 563; *Jennings v. Hammond*, 9 Q. B. D. 225.

(m) *Ottley v. Browne*, 1 Ball & Bea. 360; *Ex parte Mather*, 3 Ves. 373; *Sykes v. Beadon*, 11 Ch. D. 170. In

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Winding up.

An illegal company cannot be wound up by the Court (*n*), except perhaps at the instance of a creditor ignorant of its illegality (*o*). But if the company is legal, the mere fact that it may have engaged in some illegal transaction and sustained loss does not exclude contribution amongst the members in respect of such loss (*p*).

Costs.

A company which successfully resists an action on the ground of its own illegality cannot get costs (*q*).

Indictment.

Before quitting the subject of the consequences of the illegality of a company, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business are liable, whether incorporated or not, to be punished criminally (*r*); and even where the object of a company is not illegal, directors and others will do well to bear in mind, that if they wilfully violate the provisions of an Act of Parliament they are in strict law guilty of a misdemeanor, and liable to be indicted accordingly (*s*).

Embezzling the property of an illegal association is criminal (*t*).

Smith v. Anderson, 15 Ch. D. 247, this last decision so far as it declared the association in question to be illegal was disapproved. Had it been illegal the decision would have been correct.

(*n*) *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *Ilfracombe, &c. Building Society* [1901], 1 Ch. 102.

(*o*) See *infra*, Bk. IV., c. 1, § 2.

(*p*) *Longworth's Ex. case*, 1 De G. F. & J. 17, affirming *S. C. Johns*. 465. See Partn. 110 *et seq.* and *infra*, Bk. III., c. 2, § 3, and Bk. IV., c. 1, § 11.

(*q*) *Ilfracombe, &c., Building Society* [1901], 1 Ch. 102, winding-up petition dismissed.

(*r*) See the title Conspiracy in Russell on Crimes, and Archbold's Criminal Law. *La Société Anonyme &c., Levassor v. Panhard Levassor Motor Co., Ltd.* [1901], 2 Ch. 573.

(*s*) See *ante*, p. 126, and Lord Campbell's observations in *Longworth's Ex. case*, 1 De G. F. & J. 31. As to issuing fraudulent prospectuses, &c., see *ante*, p. 109.

(*t*) *R. v. Tankard* [1894], 1 Q. B. 598.

BOOK II.

OF THE RIGHTS AND OBLIGATIONS OF COMPANIES AS
REGARDS NON-MEMBERS.

CHAPTER I.

GENERAL PRINCIPLES OF AGENCY AS APPLIED TO COMPANIES IN THE
COURSE OF FORMATION.SECTION I.—OF THE LIABILITIES OF PROMOTERS AND SUBSCRIBERS
FOR THE ACTS OF EACH OTHER.

It was formerly held that persons engaged in establishing companies were partners; but this doctrine is clearly not law at the present day (a). Associations for forming partnerships, not being partnerships, it follows that persons who hold themselves out as members of such associations do not thereby hold themselves out as partners, either with each other or with their co-members. From this it results further that, in order that a person engaged with others in forming a company may be liable for their acts, he must have authorised them to do those acts as his agent, or have ratified such acts. The authority conferred may be general or special; but unless it is held—which it is not (b),—that the pursuit of a common object by persons in concert gives each an authority to act as the agent of the others in whatever he thinks tends to the attainment of that object, it must be held that no one is liable for the acts of the others except so far as he has, in some definite manner, constituted them his agents or ratified what they have done.

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Sect. 1.

(a) Partn. p. 18, where *Holmes v.* are explained.

Higgins, 1 B. & C. 74; *Lucas v.* (b) See, in addition to the cases
Beach, 1 Man. & Gr. 417; and cited below, *Heraud v. Leaf*, 5 C. B.
Barnett v. Lambert, 15 M. & W. 489, 157.

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Subscribers not
liable for acts
of promoters.

Promoters of
companies not
each other's
agents.

Reynell v. Lewis,
Wyld v. Hop-
kins.

The cases of *Bourne v. Freeth* (c), *Dickinson v. Valpy* (d), and *Fox v. Clifton* (e), are distinct authorities for the proposition that the allottees of shares in an unformed company are not, as such, liable for the acts of its managers. Nor are they liable for the acts of each other unless authority to do the acts can be proved (f).

The doctrine that the promoters of companies are not, as such, each other's agents, and liable for each other's acts, appears to have been first distinctly laid down by the Court of Exchequer in *Reynell v. Lewis* and *Wyld v. Hopkins* (g), which were actions brought by advertising agents and map makers against members of the provisional committees of two railway companies. In each of these cases prospectuses and advertisements had been issued by the provisional committee, and the name of the defendant, as a member of the committee, was therein announced to the public. In each case the plaintiff had been directly employed by the solicitor to the committee, and in neither case had the defendant authorised his credit to be pledged to any one, except so far as his being a member of the committee, and knowing what was going on, was to be regarded as conferring an authority to that effect. In both cases the jury found verdicts for the plaintiffs. In both, however, the Court granted new trials, and (in a judgment well worthy of attentive perusal) it was distinctly laid down, that the members of provisional committees are not partners; that they are not even *primâ facie* each other's agents; and that, in order to render any member liable for the acts of the others, it is incumbent upon those who assert that such liability exists, to prove, to the satisfaction of a jury, the existence of an authority emanating from the member in question to the others to bind him. At the same time it was as distinctly laid down that a general authority, conferred by a defendant on his co-committee men or any other person, and sufficient

(c) 9 B. & C. 632.

(d) 10 B. & C. 128.

(e) 6 Bing. 776; and 9 ib. 115.

(f) *Wood v. Argyll*, 6 Man. & Gr. 928; *Hamilton v. Smith*, 5 Jur. N. S. 32; *Hutton v. Thompson*, 3

H. L. C. 161; *Bright v. Hutton*, ib. 368.

(g) Both in 15 M. & W. 517. Compare *Maddick v. Marshall*, 16 C. B. N. S. 387, and 17 ib. 829.

to make their acts his, might be properly inferred from public announcements, and that a special authority for each act was by no means essential to render him liable for it (*h*). But no such general authority is to be assumed from the mere announcement that several persons are acting together, and endeavouring to get up a company.

The principles laid down above have since been constantly recognised and acted upon, as will be seen by reference to the numerous cases cited below, in many of which the defendant was a member, not only of a provisional committee, but of a managing committee also (*i*). The appointment, by a provisional committee, of a managing committee, does not *per se* render the members of the former liable for the acts of the latter (*k*).

It follows from the same principle that the acts, statements, and letters of one member of a committee formed for getting up a company, cannot prejudice any other member, unless the first can be shown to be the agent of the last by some other circumstance than their common object; nor is the receipt of deposits by one member equivalent to a receipt of them by the others (*l*).

(*h*) See, accordingly, *Collingwood v. Berkeley*, 15 C. B. N. S. 145; *Maddick v. Marshall*, 16 ib. 387, and 17 ib. 829; *Barnett v. Lambert*, 15 M. & W. 489; *Higgins v. Hopkins*, 3 Ex. 163; *Lake v. Argyll*, 6 Q. B. 477; *Maitlands' case*, 4 De G. M. & G. 769. See *Newton v. Belcher*, 12 Q. B. 921, and *Newton v. Liddiard*, ib. 925, as to mistaken admissions of liability. See as to contribution amongst promoters, *Lefroy v. Gore*, 1 Jo. & Lat. 571.

(*i*) *Bailey v. Macaulay*, 13 Q. B. 815; *Barker v. Stead*, 3 C. B. 946; *Rennie v. Wynn*, 4 Ex. 691; *Nevins v. Henderson*, 5 Ra. Ca. 684; *Wood v. Argyll*, 6 Man. & Gr. 928; *Patrick v. Reynolds*, 1 C. B. N. S. 727;

McEwan v. Campbell, 2 McQu. 499; *Rennie v. Clarke*, 5 Ex. 292; *Bell v. Francis*, 9 C. & P. 66; *Kerridge v. Hesse*, 9 C. & P. 200; *Barrett v. Blunt*, 2 C. & K. 271; *Barker v. Lyndon*, ib. 651; *Giles v. Cornfoot*, ib. 653; *Griffin v. Beverley*, ib. 648; *Bremner v. Chamberlayne*, ib. 569.

(*k*) *Cooke v. Tonkin*, 9 Q. B. 936; *Williams v. Pigott*, 2 Ex. 201; *Dawson v. Morrison*, 5 Ra. Ca. 62.

(*l*) See *Burnside v. Dayrell*, 3 Ex. 224; *Rennie v. Wynn*, 4 Ex. 691; *Watson v. Charlemont*, 12 Q. B. 856; *Drouet v. Taylor*, 16 C. B. 671. Compare *Rennie v. Clarke*, 5 Ex. 292; *Wontner v. Shairp*, 4 C. B. 404; *Maddick v. Marshall*, 16 C. B. N. S. 387, and 17 ib. 829.

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Members of
provisional or
managing com-
mittees.

Acts of one no
evidence against
the others.

Bk. II. Chap. 1. SECTION II.—OF THE LIABILITIES OF COMPANIES FOR THE ACTS OF
Sect. 2. THEIR PROMOTERS.

Liabilities of companies for acts of their promoters.

With respect to companies, the general principle is that no member of an unincorporated company is liable to non-members for acts done before he became a member, unless he has rendered himself liable for them by some contract between him and them (*m*). As regards incorporated companies, it is obvious that they can do no act nor have any agent before they exist themselves: whence it follows that an incorporated company is not liable for the acts and engagements of its promoters, unless it is made so by its charter, Act of Parliament, or deed of settlement, or unless it has become so by what it has done since its formation (*n*).

Where liability is imposed by constitution of company.

When a company is formed by Act of Parliament, the subscribers are usually bound by the terms of the Act obtained by the promoters of the company (*o*); and if that Act says that the company is to be liable for debts and liabilities incurred before its formation, of course it will be so liable, and the only question which can arise in such a case is as to the true construction of the Act, and the remedy upon it. The Companies Clauses Consolidation Act renders companies governed by it liable for the expenses of obtaining their special Act (*p*).

Statutory debts.

The statutory obligation thus imposed is a legal obligation enforceable (before the Judicature Acts) by an action of debt (*q*); and such action could be sustained, although the plaintiff was a member of the company (*r*).

Person to sue.

The common form of enactment which imposes the obligation usually leaves in doubt the proper person to enforce it. This point, however, was settled by *Wyatt v. Metropolitan Board of Works* (*s*); it was there (in effect) decided that only

(*m*) Partn. pp. 210 *et seq.*

(*n*) See *infra*, c. 2, § 3, as to this. As to the effect of incorporation in discharging sureties, see *Dance v. Girdler*, 1 N. R. 34. As to provisional contracts for the purchase of lands by the promoters of railway companies, see 27 & 28 Vict. c. 121, § 3.

(*o*) See as to this, *ante*, pp. 27 & 28.

(*p*) 8 & 9 Vict. c. 16, § 65; 27 & 28 Vict. c. 121, § 3 *et seq.*

(*q*) *Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962; *Hitchins v. Kilkeny Rail. Co.*, 9 C. B. 536.

(*r*) *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253.

(*s*) 11 C. B. N. S. 744.

those persons can sue the company upon a clause in the usual form who have incurred expense or bestowed time and trouble in forming the company and in getting its Act passed, and who have no other paymasters. For example, solicitors or parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such clauses (z); but solicitors or parliamentary agents who have been employed by the promoters of the company's Act, and who are entitled to be paid by them, cannot sue the company on such clauses (u).

It has also been decided that a person who has agreed with the promoters of a company's bill in Parliament to work for nothing and not to charge the company for his services, cannot sue the company for those services, although the company's Act contains such a clause as is here referred to (x).

If a promoter is paid more than the expenses sanctioned by the Act, the company can recover the excess, for the excess payment is *ultra vires* and illegal (y).

Again, notwithstanding such a clause, claims which are illegal on grounds of public policy cannot be enforced, *e.g.*, a claim by a peer for a sum of money agreed to be paid for his vote (or withdrawal of opposition) in Parliament (z), or a claim which is inconsistent with representations made to Parliament and inducing it to pass the bill (a).

Again, a company's articles of association or deed of settlement only affect the members *inter se* or the parties to the deed, and a clause adopting an agreement made by the promoters does not of itself amount to a contract on which the company can be sued by a person with whom the company has

(t) *Shaw's claim*, 10 Ch. 177, and see *ante*, note (q); *Re Tilleard*, 3 De G. J. & Sm. 519.

(u) *Kent Tramways Co.*, 12 Ch. D. 312; *Wyatt v. Metrop. Board of Works*, 11 C. B. N. S. 744; *Skegness and St. Leonards Tramway Co., Ex parte Hanly*, 41 Ch. D. 215, and *Manchester, Middleton, &c., Tram. Co.* [1893], 2 Ch. 638. *Kensington Station Act*, 20 Eq. 197, is not consistent with these cases.

(x) *Savin v. Hoylake Rail. Co.*, L. R. 1 Ex. 9. Observe that the terms of the agreement were admitted by the demurrer.

(y) *Mann v. Edinburgh North. Tram. Co.* [1893], A. C. 69.

(z) *Earl of Shrewsbury v. North Staff. Rail. Co.*, 1 Eq. 593, noticed *infra*, p. 203.

(a) *Spackman v. Lattimore*, 3 Giff. 16.

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Excessive
payment.

Illegal claims.

Adoption by the
company.

Bk. II. Chap. 1. not, in fact, entered into an agreement (b); and the fact
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that he is a member of the company makes no difference (c). But such a clause may create a trust for the plaintiff which he can enforce (d). If the promoters with whom the agreement was made are entitled to be indemnified by the company against the claim of the plaintiff he can sue them and they can bring in the company as third parties (e).

Moreover, as will be seen hereafter, a company cannot ratify a contract entered into before its formation, nor will a person who has entered into such a contract be entitled to sue or acquire any rights against the company merely by reason of the company or its directors having passed a resolution purporting to adopt it (f).

Company taking
the benefit of
the agreement.

The circumstance that a company has had the benefit of an agreement entered into by its promoters is not of itself sufficient to render the company liable to be sued upon it (g). There may, however, be cases in which it may be inequitable to allow a company to hold and enjoy property discharged from those obligations which were contracted by the promoters who enabled the company to acquire it (h).

But in the absence of special circumstances, such as those

(b) *Olympia, Ltd.* [1898], 2 Ch. p. 168; *Howard v. Patent Ivory Co.*, 38 Ch. D. 156; *Empress Engineering Co.*, 16 Ch. D. 125; *Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Rotherham Alum, &c., Co.*, 25 Ch. D. 103; *Melhado v. Porto, Alegre, &c., Rail. Co.*, L. R. 9 C. P. 503, where the directors had an option. And see *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339. As to the nature of the contract implied in articles of association, see *infra*, Bk. III., c. 1, § 4. 3.

(c) *Browne v. La Trinidad*, 37 Ch. D. 1; *Eley v. Positive Ass. Co.*, L. R. 1 Ex. D. 20 & 88, in which § 16 of the Companies Act, 1862, is considered. As to this see *infra*, Bk. III., c. 1, § 4. 3.

(d) See *Touche v. Metropolitan*

Rail. Co., 6 Ch. 671; *Terrell v. Hutton*, 4 H. L. C. 1091; *Parsons v. Spooner*, 5 Ha. 102; *Wilkins v. Roebuck*, 4 Drew. 281; *Hopkinson's case*, 7 De G. M. & G. 193; *Gandy v. Gandy*, 30 Ch. D. 67, *per* Cotton, L. J.

(e) R. S. C. Order XVI., r. 48. See the last three notes as to the rights of the plaintiff against the company.

(f) See *infra*, pp. 232 & 233.

(g) See the cases in note (b), and *Ennis v. West Clare Rail. Co.*, 15 L. R., Ir. 180, where promoters sought to make the company pay interest on money borrowed in order to make the usual Parliamentary deposit.

(h) See *infra*, p. 200, and pp. 292 *et seq.*

above alluded to, a company is not liable for what may have been done by its promoters. Thus, it was held that a company formed under the repealed Act, 7 & 8 Vict. c. 110, was not liable to pay for the services of agents employed by its promoters (before provisional registration) for purposes connected with the establishment of the company (i); and that agreements entered into after provisional but before complete registration, only bound the company when they were expressly made binding by the Act itself (k).

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Ordinary rule
in other cases.

In cases of this description the promoters themselves are liable on the contracts entered into by themselves (l), but not the company. Moreover, as already stated, a company cannot ratify a contract made by its promoters before its own existence (m). At the same time, an agreement by a company to do what its promoters have undertaken it shall do, may obviously be entered into, and such an agreement, if entered into, and if not *ultra vires*, will be binding on the company. This appears to have been the true *ratio decidendi* in *Browning v. Great Central Mining Company* (n), in which a company registered under the Companies Act of 1856 was held liable to pay the wages of a person appointed by the promoters of the company to be the manager of the company's works. The company when formed retained the manager in its service, and there were other circumstances warranting the inference that the company had appointed him its manager, although there

Why companies
are not bound
by the acts of
their promoters.

*Browning v.
Great Central
Mining Com-
pany.*

(i) *Hutchison v. Surrey Gas Co.*, 11 C. B. 689; and 3 Car. & Kir. 45.

(k) *Payne v. N. S. Wales Co.*, 10 Ex. 283; *Gunn v. Lond. and Lancashire Fire Insur. Co.*, 12 C. B. N. S. 694. These cases turned on 7 & 8 Vict. c. 110, §§ 23 & 25, as to which, see also, *Taylor v. Crowland Gas Co.*, 10 Ex. 288, note; *Terrell's case*, 2 Sim. N. S. 126; *Lloyd's case*, 1 ib. 248. *Terrell's case* was reversed on appeal, but the principle on which it was decided below is not impeachable. See *Terrell v. Hutton*, 4 H. L. C. 1091.

(l) *Kelner v. Baxter*, L. R. 2 C. P.

174; *Scott v. Lord Ebury*, ib. 255; *Lake v. Argyll*, 6 Q. B. 477; *Barton v. Hutchinson*, 2 Car. & K. 712; *Cullen v. O'Meara*, Ir. Rep. 5 Com. L. 640.

(m) See the cases in note (b), *supra*, and *infra*, pp. 232 & 233.

(n) 5 H. & N. 856. See, also, *Touche v. Metropolitan Railway Co.*, 6 Ch. 671; *Dale & Plant, Ltd.*, W. N. 1889, 131; *Pilbrow v. Pilbrow's Atmospheric Rail. Co.*, 5 C. B. 440; and *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339, where there was a contract by the company with the plaintiff, and *infra*, pp. 232 & 233.

Bk. II. Chap. 1. 1. was no evidence of any formal appointment, as required by the articles of association. The jury having found a verdict for the manager, the Court declined to disturb it. The salary sued for appears to have been calculated from a period anterior to the registration of the company, but upon this point there is some obscurity.

Liability in equity.

Edwards v. Grand Junction Railway Company.

The difficulty of holding companies bound by the acts of their promoters has been felt as much in equity as at law (*o*); but where a company has acquired property or exercised rights under an agreement entered into with its promoters, courts of equity have treated such agreement as binding on the company where the agreement has been one by which the company would have been bound if the agreement had been entered into on its behalf after its formation (*p*). The leading case on this subject is *Edwards v. The Grand Junction Railway Co.* (*q*), in which an agreement between the trustees of a turnpike road and the promoters of a railway company was entered into, to the effect that the trustees should withdraw their opposition to the company's bill, and that the company should, if its bill passed, carry the turnpike road over a bridge of certain dimensions. The trustees withdrew their opposition, the bill passed, and the company refused to perform the agreement. An injunction to restrain the company from violating the agreement was granted both by Vice-Chancellor Shadwell and by Lord Cottenham, on appeal. Lord Cottenham, in the course of his judgment, said:—

Lord Cottenham's reasoning.

"It cannot be denied that the act of Moss (the projector who signed the agreement) was the act of the projectors of the railway; it is therefore the agreement of the parties who were seeking an Act of incorporation, that, when incorporated, certain things should be done by them. But the

(*o*) See the cases in the next two notes; and as to contracts under seal, *Pickering's claim*, 6 Ch. 525.

(*p*) This condition is essential. See *Shrewsbury v. North Staffordshire Rail. Co.*, 1 Eq. 593, noticed *infra*, p. 203.

(*q*) 1 M. & Cr. 650, affirming S. C. 7 Sim. 337. See, also, *Petre v. The Eastern Counties Rail. Co.*,

1 Ra. Ca. 462, and *Stanley v. The Chester and Birkenhead Rail. Co.*, ib. 58, and 9 Sim. 264, affirmed 3 M. & Cr. 773. Compare *Aldred v. North Midland Rail. Co.*, 1 Ra. Ca. 404, where the terms of the agreement were held insufficient to preclude the company from doing what was complained of.

question is, *not whether there be any binding contract at law, but, whether this Court will permit the company to use their powers under the Act, in direct opposition to the arrangement made with the trustees prior to the Act upon the faith of which they were permitted to obtain such powers.* If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors they cannot repudiate arrangements into which such projectors had entered; *they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld.* The case of *The East London Waterworks v. Bailey* was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorised by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? *The powers under the Act give them right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such agreement? I am clearly of opinion that they cannot.*"

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The passages in italics contain, as Lord Cottenham himself explained in a subsequent case (r), the true principle on which *Edwards v. Grand Junction Railway Co.* was decided, and may be supported. In fact, the right of the plaintiff in these cases is not based upon the notion that there is any contract between him and the company, but upon the principle that as the company obtained the power to interfere with him upon certain terms, it ought not to be allowed to exercise its powers to his prejudice in violation of those terms.

Theory of this case.

The propriety of this decision has, however, been questioned and denied more than once in the House of Lords on the ground that persons who take shares on the faith of a company's Act of Parliament cannot be justly subjected to any liabilities not disclosed therein or contracted by the company after its formation (s). At the same time, the decision itself

Doubts as to this case.

(r) *Greenhalgh v. Manchester and Birmingham Rail. Co.*, 3 M. & Cr. 790, 791. (s) See *Preston v. Liverpool and*

Bk. II. Chap. 1. has not been overruled; and although Lord Cottenham's
 Sect. 2. reasoning would apply to all contracts, whether *ultra vires* or *intra vires*, and is open to objection on that account, yet as regards contracts of the latter class, the decision in *Edwards v. The Grand Junction Railway Co.* may, perhaps, still be regarded as unimpeached (t). In *Williams v. The St. George's Harbour Company* (u) the promoters of a railway company had entered into an agreement with an owner of land through which the proposed railway was to pass, for the purchase of his land on certain terms. The landowner, who up to that time had opposed the scheme, agreed to withdraw, and he accordingly did withdraw his opposition. The company obtained its Act, took the land in question, but declined to abide by the terms of the contract of sale; it had, however, so far recognised that contract, that it had allowed judgment in an action for its breach to be entered up against itself. This recognition of the contract was held sufficient to render it binding on the company, whatever might have been the case had there been no such recognition.

Cases to which
Edwards v.
Grand Junction
Railway Com-
pany does not
 apply.

Preston v. Liver-
pool, &c., Rail-
way Company.

Whatever view may be taken of such cases as *Edwards v. The Grand Junction Railway Co.*, if the promoters of a company enter into an agreement with a person, and the company, after its formation, does not exercise its powers to his prejudice, he can no more enforce the agreement against the company on equitable than on legal grounds. This was decided by the House of Lords in *Preston v. Liverpool, Manchester, &c., Railway Co.* (x). There the company did not take the plaintiff's land, and was therefore held not bound to pay for it, although the promoters had agreed to

Manchester Rail. Co., 5 H. L. C. 605; *Caledonian and Dumbartonshire Rail. Co. v. The Magistrates of Helensburgh*, 2 Macqueen, 391; *Leominster Canal Co. v. Shrewsbury and Hereford Rail. Co.*, 3 K. & J. 654; *Shrewsbury v. North Staffordshire Rail. Co.*, 1 Eq. 593, *infra*, p. 203; and *Mann v. Edinburgh North Tram. Co.* [1893], A. C. 69.

(t) See *Bedford Rail. Co. v. Stanley*,

2 J. & H. 746, where it was considered that the company was bound by the agreement sued upon. See also, *Lindsey v. The Great Northern Rail. Co.*, 10 Ha. 679.

(u) 2 De G. & J. 547, varying the S. C. 24 Beav. 339.

(x) 5 H. L. C. 605, affirming 17 Beav. 114. See the same case on demurrer, 1 Sim. N. S. 586.

pay him a large sum for his land if he withdrew his opposition to their bill, which he did. The plaintiff had nothing but the agreement to rely upon, and even according to *Edwards v. The Grand Junction Railway Co.*, this alone is not sufficient (y).

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Again, if the contract of the promoters is one which would be *ultra vires* if entered into by the company after its formation, such contract, even if attempted to be ratified by the company when formed, cannot bind the company. For example, agreements by the promoters of a company that the company, when formed, shall apply its funds to purposes for which they are not subscribed, clearly do not bind the company. Nor can the principle of *Edwards v. The Grand Junction Railway Co.* be applied to agreements of this description. In *The Earl of Shrewsbury v. North Staffordshire Railway Co.* (z), an agreement was entered into first by the promoters of a railway company, and afterwards by the company itself, to pay a peer 20,000*l.* for his countenance and support in obtaining the company's Act, and also to compensate him for such land as the company should take or injuriously affect. It was held that this agreement was *ultra vires* and could not be enforced against the company, although under its statutory powers it took land belonging to that peer (a).

Agreements which are *ultra vires*.

Shrewsbury v. North Staffordshire Railway Company.

(y) A similar observation applies to *Caledonian, &c., Rail. Co. v. Magistrates of Helensburgh*, 2 Macqueen, 391.

(z) 1 Eq. 593, where all the cases were most carefully examined.

(a) This is by no means the only authority for saying that agreements by the promoters of a company to the effect that the company shall pay a large sum of money in consideration of the withdrawal of opposition to its bill in Parliament are altogether *ultra vires*. See *Preston v. Liverpool, Manchester, &c., Rail. Co.* 5 H. L. C. 605. The agreements in *Petre v. Eastern Counties Rail. Co.*, 1 Ra. Ca. 642, and *Stanley v. Chester and Birkenhead Rail. Co.*, ib. 58, and

9 Sim. 264, and 3 M. & Cr. 773, Agreements for withdrawal of opposition to bill in Parliament. were of such an extravagant nature that they might well be held *ultra vires*. In the first of these cases 120,000*l.*, and in the latter 20,000*l.*, were agreed to be paid for the withdrawal of opposition to a bill, and for compensation for the land which might be taken and injuriously affected. It does not, however, follow that such agreements are in any other respects illegal; and it seems that they are not, if the person withdrawing his opposition is personally interested in opposing the bill. See *Simpson v. Lord Hovden*, 9 Cl. & Fin. 61; 10 A. & E. 793 & 807; 3 M. & Cr. 97.

CHAPTER II.

GENERAL PRINCIPLES OF AGENCY AS APPLIED TO COMPANIES
AFTER THEIR FORMATION.

Bk. II. Chap. 2.

Agents of companies which are formed.

Company not bound by the acts of its members.
Burnes v. Pennell.

THE circumstance that a joint-stock company consists of a large and fluctuating body of members, is itself sufficient to prevent the application to companies of the ordinary partnership rule, that each member of a firm is its agent, for the purpose of carrying on its business. All persons dealing with companies are supposed to know this, and to know that the management of their affairs is entrusted to a few individuals who, and who alone, have power to act for them (a).

Burnes v. Pennell (b), in the House of Lords, is a good illustration of the doctrine that a company is not, like an ordinary partnership, responsible for the acts of its members. In that case a shareholder in a company, who was also its solicitor and law agent, induced a person, by false representations as to the flourishing state of the company, to buy shares in it. The purchaser being afterwards sued for calls, relied upon the fraud as a defence, and he also sought to have the transfer of the shares to him cancelled. But it was held, that it was no part of the business of the company's solicitor to make any representations on its behalf as to its condition; and that, although he was himself a shareholder, his statements were not the statements of the company, he not being, in his character of shareholder, an agent of the company for any purpose whatever.

Whether the company is incorporated or not, whether it is a chartered company, a registered company, a company merely

(a) See *Ridley v. The Plymouth Grinding and Baking Co.*, and *Kingsbridge Flour Mill v. Same*, 2 Ex. 711;

Smith v. Hull Glass Co., 11 C. B. 897; *Ernest v. Nicholls*, 6 H. L. C. 418, per Lord Wensleydale; *Burnes*

v. Pennell, 2 H. L. C. 497.

(b) 2 H. L. C. 497. See, also, *Barnett, Hoares & Co. v. The South London Tramways Co.*, 18 Q. B. D. 815.

empowered to sue and be sued by a public officer, or a company of some other description, is of no consequence whatever as regards the question here alluded to; the same reason applies to them all (c). Bk. II. Chap. 2.
Sect. 1.

SECTION I.—WHO ARE AGENTS.

1. Directors.

The directors then of a company, and such other persons, if any, as may be entrusted with the management of its affairs, are its only agents; and by the acts of its directors a company is bound, provided those acts are within the limits of their real or apparent authority; and provided the person dealing with them has had no notice of the irregularity (if any) of their proceedings (d). Moreover the power of directors to bind the company is not affected by any irregularity in their own appointment if the person dealing with them acted *bonâ fide* and without notice of such irregularity (e); although such irregularity may prevent the company from enforcing what they have purported to do as agents of the company (f). Directors the
agents of the
company.

But it by no means follows that each director is the agent of the company. Speaking generally, it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two, or one of them. Therefore, if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *primâ facie* not bound by the acts of a fewer number. It has been held, for example, that two out of several directors had no power to waive a forfeiture (g), or to allot shares (h); that four out of five had no power to compromise a large debt due to the company and to indemnify the debtor against certain bills of Acts done by
less than the
proper number
of directors.

(c) See Lord Campbell's judgment in *Burnes v. Pennell*, 2 H. L. C. 520 *et seq.*, and *Bramah v. Roberts*, 3 Bing. N. C. 963.

(d) See *infra*, as to this.

(e) *County Life Ass. Co.*, 5 Ch. 288.

(f) *Garden Gully Co. v. McLister*,

1 App. Ca. 39; and *Bottomley's case*, 16 Ch. D. 681.

(g) *Card v. Carr*, 1 C. B. N. S. 197.

(h) *Portuguese Consolidated Copper Mines, Ltd.*, 42 Ch. D. 160; *Howard's case*, 1 Ch. 561; *Ex parte Smith*, 39 Ch. D. 546. Compare *Scottish Petroleum Co.*, 23 Ch. D. 413.

Bk. II. Chap. 2. exchange (*i*) ; that six out of eight had no power to bind Sect. 1. — the company to pay for services rendered pursuant to their order (*k*) ; that four out of five had no power to bind the company by an agreement for a lease (*l*) ; that the representations of one director could not be regarded as those of the company (*m*) ; that notice to one director did not affect the company (*n*) ; that instructions to sell land given to an auctioneer by one director and by the solicitor of a company, could not, without further evidence, be considered as having been given by the company (*o*) ; that one liquidator out of four could not bind the company by a bill (*p*).

Majority of board.

But it must not be supposed that the majority of a duly convened and duly constituted board of directors cannot act for the whole board and bind the company. Business could not be carried on if such a rule were to prevail. The decisions referred to above do not apply to such a case.

Delegation of authority.

Directors being themselves agents, are *primâ facie* unable to delegate their authority to one or more of their own number (*q*) ; but in many companies, and in all which are governed by Table A. in the schedule to the Companies Act, 1862, the directors are authorised to delegate their powers to a few, and even to one only (*r*), of themselves, and such a delegation may be presumed if one or two directors act for the company in a matter incidental to its legitimate business (*s*).

Where the proper number of directors does not exist.

Where the power to act for a company is vested in a given number of directors, and that number does not exist, and there

(*i*) *Kirk v. Bell*, 16 Q. B. 290.

(*k*) *Brown v. Andrews*, 13 Jur. 938.

(*l*) *Ridley v. Plymouth Grinding Co.*, 2 Ex. 711.

(*m*) *Holt's case*, 22 Beav. 48 ; *Nicol's case*, 3 De G. & J. 387. But see as to reports made by the chairman to a meeting of shareholders, *Derula Mining Co.*, 22 Ch. D. 593.

(*n*) *Ex parte Crédit Foncier and Mobilier of England*, 7 Ch. 161 ; and *infra*, pp. 251 *et seq.*

(*o*) *Moody v. Lond. and Brighton Rail. Co.*, 1 B. & Sm. 290.

(*p*) *Ex parte Birmingham Banking Co.*, 3 Ch. 651.

(*q*) *Cartmell's case*, 9 Ch. 691 ; *Howard's case*, 1 Ch. 561 ; *Ex parte Birmingham Banking Co.*, 3 Ch. 651 ; *Cook v. Ward*, 2 C. P. D. 255.

(*r*) *Art. 68 & Taurine Co.*, 25 Ch. D. 118.

(*s*) *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674 ; *Lyster's case*, 4 Eq. 233 ; *Ex parte The Contract Corporation*, 3 Ch. 105 & 116 ; as to a managing director *Biggerstaff v. Rowatt's Wharf, Ltd.* [1896], 2 Ch. 93.

is no provision in the company's regulations enabling the directors to act, notwithstanding a vacancy in their board, the directors who do exist cannot act for the company. Thus, in *In re Alma Spinning Company, Bottomley's case* (t), where the articles of association provided that the business of the company should be conducted by not less than five nor more than seven directors, it was held that these words were imperative, and not merely directory, and consequently a call made by the directors, when their number had been reduced to four, and a resolution passed by them forfeiting a member's shares for non-compliance with the call were invalid. It is otherwise if the continuing directors have power to act notwithstanding a vacancy (u). At the same time, if a company does in fact carry on business by certain persons who are allowed by the shareholders to act as if they were the duly constituted directors of the company, the company will be bound by the acts of such persons at all events in all ordinary matters of business, in favour of all persons *bonâ fide* dealing with them, without notice of their insufficiency in number or defective appointment (x). But as to matters out of the ordinary course of business, it was held in an early case that the company will not be bound. In *Kirk v. Bell* (y), where a company's deed of settlement contained a clause to the effect that there should not be less than five directors, and that three should be a quorum for the transaction of ordinary business, and where there were in fact only four directors, it was held that a deed executed by these four on behalf of the company did not bind it, the deed being of an unusual description, and not a matter of ordinary business.

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Sect. 1.

Bottomley's case.

Kirk v. Bell.

Closely connected with the present subject is the question Acts done by directors but not by a Board.

(t) 16 Ch. D. 681; and compare *staff v. Rowatt's Wharf, Ltd.* [1896], 2 Ch. 93; *Duck v. Tower Galvanizing Co., Ltd.* [1901], 2 K. B. 314; *Mahony v. East Holyford Mining Co., L. R.* 7 H. L. 869; *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552.

(u) *Owen and Ashworth's claim* [1901], 1 Ch. 115; *Scottish Petroleum Co., 23 Ch. D. 413*; *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

(x) See *Davies v. R. Bolton & Co.* [1894], 3 Ch. 678; *County of Gloucester Bank v. Rudry, Merthyr, &c., Co.* [1895], 1 Ch. 629; *Bigger-*

was asked to set aside a judgment.

(y) 16 Q. B. 290. See the provisions in the company's deed.

Bk. II. Chap. 2. whether an act which ought to be done by a *Board* of directors
Sect. 1. --- is valid when done by the requisite number but not at a board

meeting. There certainly is authority for answering this question in the negative (z); and as between the company and its members in matters concerning the internal management of the company, and as between the company and any person dealing with it with notice of the irregularity, that answer is probably correct. But as between the company and persons dealing with it without notice of the irregularity, the preponderance of authority is in favour of holding the company bound (a).

Quorum must
be present and
the meeting be
properly sum-
moned.

Moreover, in order that a majority of persons present at a meeting may exercise the powers of a meeting, the meeting itself must not be too small. If a quorum be fixed, the quorum must be present (b); but if the company's regulations give the directors the power of fixing the quorum, a person dealing with the company without notice of any irregularity is entitled to assume that the proper quorum was present (c). Moreover, the Court may infer from the usual conduct of the company's business that the number originally fixed by the directors has been changed (d). If the company's regulations do not contain

(z) *State of Wyoming Syndicate* [1901], 2 Ch. 431; *Haycraft Gold, &c., Co.* [1900], 2 Ch. 230; *Bosanquet v. Shortridge*, 4 Ex. 699; *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158. Distinguish *Ex parte Kennedy*, 44 Ch. D. 473, which decided that the subscribers of the memorandum of association can, if unanimous, exercise the power of appointing the first directors under Art. 52 of Table A. without a meeting; in such case they do not act as directors; but a meeting is necessary unless they are unanimous, see *John Morley Bldg. Co. v. Barras* [1891], 2 Ch. 386.

(a) See *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Collie's claim*, 12 Eq. 246; *County Life Ass. Co.*, 5 Ch. 288. In *Collie's claim* it was said, but surely not correctly (see, too, *per Cozens-Hardy, J.*, in *Haycraft Gold, &c., Co.* [1900],

2 Ch. p. 235), that *D'Arcy v. Tamar, &c., Rail. Co.*, turned on a technical rule of pleading. See, further, the cases as to irregularity, cited *infra*.

(b) *Newhaven Local Bd. v. Newhaven School Bd.*, 30 Ch. D. 350; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Ex parte Morrison*, De Gex, 539; and compare *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

(c) *Owen and Ashworth's case* [1901], 1 Ch. 115; *Biggerstaff v. Rowatt's Wharf, Ltd.* [1896], 2 Ch. 93; *County of Gloucester Bank v. Rudry, Merthyr, &c., Co.* [1895], 1 Ch. 629; distinguishing *D'Arcy v. Tamar Kit Hill, &c., Co.*, L. R. 2 Ex. 158, on the ground that the quorum in that case was imperatively fixed by Act of Parliament, and *ante*, note (x).

(d) *Southern Counties, &c., Bank v. Rider*, 73 L. T. 374, cited and

any provisions as to the quorum, but the directors have power to delegate their authority, the number who usually act will form the quorum (*e*); in other cases it seems that at least a majority of the whole number of the directors must be present (*f*). Moreover, in order that the majority present at a board meeting may act, all directors within reach must be given notice of the meeting, and a director cannot waive his right to a notice (*g*); the notice must not be unreasonably short (*h*), but it need not state the business to be transacted (*i*).

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Sect. 1.

Notice of
meeting.

Primâ facie, the power of the directors of a company to bind it commences at the date of its formation or of their appointment; but the commencement of that power may be postponed to a later period; and if it is, their previous acts will not bind the company to a person dealing with them with notice express or implied of their want of authority (*k*). The Companies Act, 1900, prohibits any company registered after 31st December, 1900, where there is an invitation to the public to subscribe for its shares, from commencing business or exercising any borrowing powers until certain conditions, relating to the allotment of shares and payments on shares taken by directors, have been complied with, and a statutory declaration that these conditions have been complied with has been filed with the registrar. Any contract made before the date at which the company is entitled to commence business is provisional only, and is not binding on the company until that date; on that

Commencement
of directors'
power to bind
the company.

Under Com-
panies Act,
1900.

distinguished in *Haycraft Gold, &c., Co.* [1900], 2 Ch. pp. 235, 236.

(*e*) *Lyster's case*, 4 Eq. 233, and cases cited *ante*, note (*s*).

(*f*) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *London v. Southern Counties Land Co.*, 31 Ch. D. 223, which, however, was a decision as to a meeting of the subscribers of the memorandum of association under Table A., Art. 52. *Portuguese, &c., Mines, Ltd.*, 42 Ch. D. p. 168.

(*g*) *Portuguese, &c., Mines, Ltd.*, 42 Ch. D. 160; *Harben v. Phillips*, 23 Ch. D. 14, where some directors were wrongfully excluded from the

meeting.

(*h*) *Ex parte Smith*, 39 Ch. D. 546; *John Morley Bldg. Co. v. Barras* [1891], 2 Ch. 386. Compare *Browne v. La Trinidad*, 37 Ch. D. 1, where the director complaining of insufficient notice did not object promptly, and the consequences of the irregularity could have been cured at any moment.

(*i*) *La Compagnie de Mayville v. Whitley* [1896], 1 Ch. 788.

(*k*) See *Peirce v. Jersey Waterworks Co.*, L. R. 5 Ex. 209. Compare *Touche v. Metropolitan Rail., &c., Co.*, 6 Ch. 671.

Bk. II. Chap. 2. date it becomes binding (*l*). The Act also without prejudice
 Sect. 1. to any other liability imposes penalties on any person responsible for the contravention of these provisions (*m*), and makes it the duty of the registrar on the filing of the statutory declaration to certify that the company is entitled to commence business, and his certificate is conclusive on the point (*n*).

Termination of directors' power. Again in conformity with the general principles of agency, the directors of a joint-stock company continue to have power to bind it, not only as long as their appointment lasts, but also as long as its termination is unknown to those with whom they have been accustomed to deal. But this proposition must be taken in connection with the rule that persons dealing with companies are deemed to have notice of the contents of companies' Acts of Parliament, charters, and registered deeds of settlement; and consequently, if it is sought to make a company liable for the acts done by its directors after their retirement from office, it must be ascertained whether, upon the principle alluded to, there was or was not notice of the cessation of their authority to act for the company (*o*).

The extent to which directors are agents of each other and liable for each others acts will be noticed hereafter (*p*).

2. Agents who are not directors.

Agents who are not directors.

The directors of a company are not necessarily its only agents. It may, and indeed generally must, be competent for them to employ other persons to act for the company; and where this is the case, those persons will also have power to bind the company within the limits of their agency but not further (*q*). In dealing with the agents of companies there is great danger of finding their authority altogether repudiated, on the ground that they have not been duly appointed. Now, although directors have no implied power to delegate the authority conferred upon themselves, yet they must necessarily employ persons not only to do the every-day work of the com-

(*l*) Companies Act, 1900, § 6 (1) and (3) and § 4. For form of declaration see form No. 44, in the order of the Board of Trade, dated 28 Dec., 1900.

(*m*) *Ib.*, § 6 (5).

(*n*) *Ib.*, s. 6 (2), and see further as to this, *infra*, p. 230.

(*o*) See as to notice, *infra*, p. 217.

(*p*) Book II., c. 6, § 1.

(*q*) See *infra*, p. 212, note (*d*).

pany, but also to transact special branches of business requiring peculiar knowledge. Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless—1, their employment was altogether beyond the power of the directors; or unless, 2, the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity (*r*). Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bonâ fide* and without notice of the irregularity in his appointment. The following cases are important on this point.

In *Smith v. The Hull Glass Company* (*s*), it was held that a company registered under 7 & 8 Vict. c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorised by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bonâ fide* with such persons, have a right to assume that they have been duly appointed (*t*).

This view is in accordance with later authorities. Thus, a company has been held bound by a verbal contract with the chairman of directors, although a sealed contract countersigned by three directors was required by the company's deed of settlement (*u*); so by orders for repairs given by a secretary instead of by the directors (*x*); so by an agreement for the sale of

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*Smith v. Hull
Glass Company.*

Authority
inferred.

(*r*) See *Hawken v. Bourne*, 8 M. & W. 703, and the cases cited in the next few notes.

(*s*) 8 C. B. 668, and 11 ib. 897.

(*t*) See 11 C. B. 927. The other judges relied more on the fact that the directors had sanctioned and adopted the contracts. But as the knowledge on the part of the direc-

tors of what was done was assumed rather than proved, there was little if any difference in the views of the different members of the Court.

(*u*) *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341.

(*x*) *Allard v. Bourne*, 15 C. B. N. S. 468.

Bk. II. Chap. 2. land made by a company's manager who was allowed by the directors to make such contracts (y) ; so by cheques drawn by

Giles v. Taff
Railway Com-
pany.

de facto but improperly appointed directors (z) ; so by letters of hypothecation given by a person acting as managing director (a). Again, in *Giles v. The Taff Railway Company* (b), it was held that a railway company was liable for a tort committed by one of its servants in the course of his employment, although there was no proof, except that afforded by the fact of employment, that he was the servant of the company.

Browning v.
Great Central
Mining Com-
pany.

Even as between the agent himself and the company, if the directors appoint him and allow him to act as agent of the company, and he does so act *bonâ fide* and without notice of any irregularity in his appointment, the company will be liable to him for his salary although he may not have been appointed precisely in the manner prescribed by the regulations of the company (c).

Limits to autho-
rity of agent.

These cases must not be confounded with others in which companies have been held not bound by acts done by their agents when acting beyond the limits set by the nature of their employment (d).

(y) *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, affd. 2 De G. J. & Sm. 475. Compare *Moody v. London and Brighton Rail. Co.*, 1 Best & Sm. 290.

(z) *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

(a) *Biggerstaff v. Rowatt's Wharf, Ltd.* [1896], 2 Ch. 93.

(b) 2 E. & B. 822 ; *Goff v. G. N. Rail. Co.*, 3 E. & E. 672. See, further, *infra*, c. 3, § 2.

(c) *Browning v. Great Central Mining Co.*, 5 H. & N. 856. In this case an appointment under the seal of the company was not necessary. See, also, *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674.

(d) See as to borrowing money, *Jacobs v. Morris* [1901], 1 Ch. 261 ; *Bryant, Powis, &c., Ltd. v. La Banque du Peuple* [1893], A. C. 170 ; and compare *Robinson v. Montgomeryshire Brewing Co.* [1896], 2 Ch. 841. As

to promissory notes, *Simpson's claim*, 36 Ch. D. 532 ; and compare *Bryant Powis, &c., Ltd. v. Quebec Bank* [1893], A. C. 170 ; *Jacobs v. Morris* [1901], 1 Ch. 261 ; as to buying shares, *Cartmell's case*, 9 Ch. 691 ; as to policies of insurance issued by local agents, *Linford v. Provincial Horse and Cattle Insurance Co.*, 34 Beav. 291 ; compare *Bawden v. London, Edinburgh, &c., Ass. Co.* [1892], 2 Q. B. 534 ; as to orders by station masters for surgical attendance, *Cox v. Midland Counties Rail. Co.*, 3 Ex. 268 ; *Walker v. Great Western Rail. Co.*, L. R. 2 Ex. 228 ; statements made by secretary, *Barnett, Hoares & Co. v. South Lond. Tramways Co.*, 18 Q. B. D. 815, and by a managing director, *George Whitechurch, Ltd., v. Cavanagh*, 17 Times L. R. 746 ; statements by solicitors as to the flourishing condition of the company, *Burnes v. Pennell*, 2 H. L. C. 497 ; sales by a solicitor not instructed to sell by

SECTION II.—AUTHORITY OF AGENTS OF COMPANIES.

Bk. II. Chap. 2.
Sect. 2.

Having seen who are to be considered agents of a company, it is necessary to examine the limits within which a company is answerable for their acts. Agents cannot have a more extensive authority than their principals can legally confer upon them; and this principle at once limits the authority of all agents of incorporated companies. The capacity of such companies is itself limited, and they cannot be legally bound by any acts of their directors or officers in which the companies themselves are legally incompetent to engage. But as regards other matters, business cannot be carried on unless the directors of companies may be dealt with, on the assumption that they have power to bind their companies by all such acts as can fairly be said to be necessary for the purpose of carrying on their legitimate businesses in the way in which such businesses are usually carried on by other people. Such power is consequently implied (e) in favour of all persons dealing *bonâ fide*, and without notice of its non-existence. Further it is established that what the directors of a company have power to do, and do in the name of the company and on its behalf (f), binds the company, although they may not have acted in the manner prescribed by the regulations of the company. A distinction is thus taken between what directors have no power to do at all, and what they have power to do, provided certain conditions are complied with; in other words, between acts which, as regards the company, are altogether *ultra vires* and those which are *intra vires* but irregular; and whilst it is held that companies are not bound by acts of the former class, it is held that they may be bound by acts of the latter class in favour of all persons dealing with their directors *bonâ fide* and without notice of the irregularities of which they may be guilty (g).

Limits of the
directors'
authority.

Distinction between acts *ultra vires* and acts *intra vires*, but irregular.

the directors, *Moody v. Lond. and Brighton Rail. Co.*, 1 B. & Sm. 290.

(e) See *Smith v. Hull Glass Co.*, 8 C. B. 668; *Taunton v. Royal Insur. Co.*, 2 Hem. & M. 135; *A.-G. v. Great Eastern Rail. Co.*, 5 App. Ca. 473.

(f) See *Hambro' v. Hull, &c., Insurance Co.*, 3 H. & N. 789.

(g) See generally on the subject of the ensuing pages a treatise on the doctrine of *ultra vires* by Seward Brice, K.C. Third edition, published in 1893.

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Acts altogether
ultra vires.

1. *Of acts which are ultra vires.*

With respect to those acts which directors have no power to do at all, it must be borne in mind that trading and similar corporations which are created for certain definite purposes have no greater capacity than is conferred upon them by their constitution (*h*). They exist for certain purposes, more or less well defined in the instrument incorporating them, but they exist for no other purposes; and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract entered into by or on behalf of a body corporate, that such contract is one into which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid; moreover, a judgment on such a contract obtained by consent in proceedings in which the question of *ultra vires* was not raised, is of no greater validity than the contract itself, and will be set aside at the instance of the company (*i*). This is not the consequence of any doctrine of the law of agency, but of the nature of corporations, and of the difference between them and ordinary individuals (*k*). This principle applies to joint stock companies. But there is an important difference between incorporated and unincorporated companies, for whilst it is competent for *all* the shareholders of an unincorporated company to depart from the agreement entered into by each with the others (*l*), it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto (*m*); the same rule holds good in the case of

(*h*) See the judgment of Bowen, L. J., in *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 684 n., where the difference between trading and other corporations of that kind, and municipal corporations is pointed out, and *infra*, p. 216.

(*i*) *Gt. North-Western Central Rail. Co. v. Charlesbois* [1899], A. C. 114.

(*k*) See upon this subject. Pollock on Contracts, 6th ed., 110 *et seq.*; *Att.-Gen. v. Great Eastern Rail. Co.*,

5 App. Ca. 473, and 11 Ch. D. 449; *L. and N. W. Rail. Co. v. Price*, 11 Q. B. D. 485; *London Financial Assoc. v. Kell*, 26 Ch. D. 107; *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, 36 Ch. D. 675 n., *ib.* 674, and 38 Ch. D. 534; and the cases referred to *infra*, notes (*t*) and (*u*).

(*l*) Partn. p. 409; *Blackburn Benefit Soc. v. Cunliffe, Brookes & Co.*, 29 Ch. D. 902.

(*m*) See *Mann v. Edinburgh North.*

the so called "one man" companies (n). Nor can a corporate body be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done (o). Bk. II. Chap. 2.
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An act or a contract which is *ultra vires* and therefore invalid is not necessarily devoid of all legal effect. For instance, if a company, expressly forbidden by its constitution to lend money, does so on the security of goods or land, the property in the goods or land will, if duly conveyed, pass to the company notwithstanding the prohibition (p).

The constitution of a company as settled by its charter, Act of Parliament, memorandum of association, or deed of settlement, limits, to a certain extent, the powers of its directors; for whatever it may or may not be competent for all the shareholders to do, it certainly is not competent for the directors of a company to bind it by entering on its behalf into transactions not warranted by its constitution as settled for the time being (q). The directors of a company have authority to do whatever is necessary for the transaction of the company's legitimate business in the way in which such business is usually carried on by other people (r), but they have no power to engage in a class of business for the transaction of which the company was not formed (s). Powers of directors limited by the constitution of the company.

With respect to the capacities of trading and similar Capacity of corporations.
Tram. Co. [1893], A. C. 69; *Gt. North-West. Central Rail. Co. v. Charlesbois* [1899], A. C. 114; *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Society of Practical Knowledge v. Abbott*, 2 Beav. 559; *Bagshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 M. & G. 389; and *Baroness Wenlock v. River Dee Co.*, *ubi supra*.

(n) *Geo. Newman & Co.* [1895], 1 Ch. 674.

(o) See *Gt. North-West. Central Rail. Co. v. Charlesbois* [1899], A. C. 114; *Islington Vestry v. Hornsey Urban Council* [1900], 1 Ch. p. 705; *Baroness Wenlock v. River Dee Co.*, *ubi supra*; *Ex parte Watson*, 21 Q. B. D. 301; *Fairtitle v. Gilbert*, 2 T. R. 169. Compare *Webb v. Commis-*

sioners of Herne Bay, L. R. 5 Q. B. 642, where the company had power to issue debentures, although they did not properly exercise the power, and such cases as *Burkinshaw v. Nicolls*, 3 App. Cas. 400, *ante*, p. 82, where a company has been estopped from denying that shares stated to be fully paid up are so in fact.

(p) *Ayers v. S. Australian Banking Co.*, L. R. 3 P. C. 548.

(q) *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653.

(r) *Smith v. Hull Glass Co.*, 8 C. B. 668; *Taunton v. Royal Ins. Co.*, 2 Hem. & M. 135.

(s) The cases on this head are excessively numerous, and will be noticed hereafter.

Bk. II. Chap. 2. corporate bodies to bind themselves by contracts, there is
 Sect. 2. an apparent difference of opinion upon the question whether the burden of proof is upon those who assert that the power to enter into any particular contract exists or upon those who assert the contrary.

It is agreed on all hands that a corporation cannot lawfully do that which its constitution does not expressly or impliedly warrant. The difference of opinion, if there really be any, is not as to that, but simply as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown ; or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication.

Ashbury, &c.,
 Co. v. Riche.

The former is apparently the correct view so far as municipal and other corporations not created for any clearly limited purpose are concerned (t) ; but the latter is now settled to be the correct view with respect to trading and similar corporations which are created for certain definite purposes only (u). That such corporations cannot do that which their constitution does not warrant admits of no doubt, and is conclusively established by the decision of the House of Lords in *Ashbury Railway Carriage Co. v. Riche* (x). In that case it was held that a company formed and registered under the Companies Act, 1862, for contracting to supply materials for making railways and to carry on the business of general contractors, was not bound by a contract to make a railway, although such contract had been entered into by directors of the company, and had been afterwards approved by the shareholders (y).

(t) See the authorities cited, L. R. 9 Ex. 262 *et seq.*

(u) The leading cases on this subject are *A.-G. v. London County Council* [1901], 1 Ch. 781 ; *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, and 36 Ch. D. 674, and *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, and 9 Ex. 224. See Lord Justice Bowen's judgment, 36 Ch. D. 684 n. ; and

Lord Selborne's judgment, L. R. 7 H. L. 693, both of which are in favour of the view in the text ; but the judgment of Lord Blackburn, 9 Ex. 262 *et seq.*, is opposed to it.

(x) L. R. 7 H. L. 653, S. C. L. R. 9 Ex. 224, 249.

(y) Compare *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214, where what was done was within the scope of the memorandum of association.

Such a contract was not authorised by the company's memorandum of association and could not bind the company in its corporate character, even though every shareholder in it might have assented to it. The rule laid down in this case applies to all companies created by statute for a particular purpose, and is not confined to companies created by the Companies Act, 1862 (z). At the same time, whatever may fairly be regarded as incidental to or consequential upon those things, which the legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires* (a).

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Companies' articles of association and deeds of settlement usually prescribe certain limits to the powers of their directors, rendering them much less extensive than they would be if limited merely by the purpose for which the companies are formed; and opinions have differed upon the question whether the public can safely deal with the directors of companies without ascertaining the real limits set to their authority (b). But it is now settled that persons who deal with a company whose regulations are registered, and are therefore accessible to the public, cannot hold the company liable if the directors exceed their authority as disclosed by those regulations. Accordingly in *Balfour v. Ernest* (c), it was held, that an

Public bound to notice the regulations of the company.

Balfour v. Ernest.

(z) *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473, and 11 Ch. D. 449; *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, and 36 Ch. D. 675 n.; *Great North-Western Central Rail. Co. v. Charlesbois* [1899], A. C. 114; *Mann v. Edinburgh Northern Tram. Co.* [1893], A. C. 69.

(a) *Att.-Gen. v. Great Eastern Rail. Co.*, *ubi supra*; *L. and N. W. Rail. Co. v. Price*, 11 Q. B. D. 485; *Foster v. London, Chatham and Dover Rail. Co.* [1895], 1 Q. B. 711; *Att.-Gen. v. London County Council* [1901], 1 Ch. 781, Bk. III., c. 1, § 3.

(b) The difference of opinion on this subject will be seen at once by comparing the judgments in *Greenwood's case*, 2 Sm. & G. 95 (reversed

on appeal, 3 De G. M. & G. 459); *Ernest v. Nicholls*, 6 H. L. C. 401; *Royal British Bank v. Turquand*, 6 E. & B. 327; *Athenæum Life Ass. Society v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. See as to Lord Wensleydale's observations in 6 H. L. C. 419; *Agar v. Athenæum Life Ins. Soc.*, 3 C. B. N. S. 725; *London Dock Co. v. Simmott*, 8 E. & B. 347.

(c) 5 C. B. N. S. 601. See, too, *Irvine v. Union Bank of Australia*, 2 App. Ca. 366, and *London and New York Invest. Corp.* [1895], 2 Ch. p. 870, as to resolutions which ought to be registered; *Peirce v. Jersey Waterworks Co.*, L. R. 5 Ex. 209; *Ex parte Overend, Gurney & Co.*, 4 Ch. 460; *Ex parte Eagle Ins. Co.*,

Bk. II. Chap. 2. insurance company was not bound by a bill of exchange
Sect. 2. accepted by its directors on its behalf for a debt incurred by another insurance company, which had been amalgamated with the first; for the amalgamation was not authorised by the deed of settlement of the company on whose behalf the bill had been accepted, and the holder of the bill was aware of the nature of the debt for which the bill had been given.

Chapleo v.
Brunswick
Building
Society.

Again in *Chapleo v. Brunswick Building Society* (d), it was held that persons who have dealings with a building society must be taken to know that such a society has no power of borrowing except such as is conferred upon it by its rules; and if the directors exceed their authority in this respect, those who trust them and lend them money for the society, cannot compel the society to repay it.

Limits of this
doctrine.

This doctrine is based upon the necessity of protecting shareholders against the unauthorised acts of their directors, and ought not to be extended to cases in which persons who are really ignorant of the powers of directors, seek to make them personally responsible for the assumption of powers they did not really possess. The liability of directors in respect of contracts entered into by them beyond their powers will be alluded to hereafter (e); and it will then be seen that although such contracts do not bind the company for which the directors may have acted, it by no means follows that they are not personally liable in respect of them.

2. Of acts which are *intra vires*, but irregular.

Acts *intra vires*,
but irregular.

Notwithstanding, however, that a company is not bound by those acts of its directors, which as regards the company are *ultra vires*, and notwithstanding the doctrine that persons dealing with companies are affected with notice of their registered regulations, yet, as already stated, there is no necessity on the part of such persons to see that *de facto*

4 K. & J. 549; *Athenæum Life Ass. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294; *Sheffield's case*, Johns. 451, and *Kearns v. Leaf*, 1 Hem. & M. 681.

(d) 6 Q. B. D. 696, at pp. 712 & 713. See, further, as to borrowing powers, *infra*, Bk. II., c. 5, §§ 1 and 2. (e) Book II., c. 6, § 1.

directors are properly appointed (*f*), nor to see that directors exercise the powers they possess in the precise manner prescribed by the regulations of the company; and it may be taken as now settled that persons dealing with directors *bonâ fide*, and without notice of an irregular or improper exercise of their powers, are not affected by such irregularity or impropriety. Moreover, a person who deals with a company on the faith of its registered articles is entitled to assume that the articles, if such as the company could pass, have been validly passed (*g*).

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The leading authority on this head is *The Royal British Bank v. Turquand* (*h*). In that case, a company's deed, registered under 7 & 8 Vict. c. 110, empowered the directors to borrow on the bonds of the company such sums, as by a general resolution of the company might be authorised to be borrowed. The directors gave the bankers of the company a bond for 1,000*l.*, sealed with the seal of the company, and signed by two directors, as a security for what might be due from the company to its bankers on its current account. This was not authorised by any resolution of the company, and it was therefore contended that the bond was invalid. There was no question here as to the form of the bond, or as to the authority of those who issued it to act for the company. The company was *primâ facie* bound by the bond, and no one looking only at the deed of settlement and the bond, could come to a different conclusion. The only question was, whether the bankers were bound to look further and to ascertain whether the issuing of the bond had been authorised by the resolution of a general meeting. It was held both by the Court of Queen's Bench and by the Court of Appeal, that they were not, and that the excess of authority was a matter which concerned only the shareholders and the

Royal British
Bank v. Tur-
quand.

(*f*) *County Life Ass. Co.*, 5 Ch. 288, where there were some duly appointed directors; *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869, where there were none.

(*g*) See *Muirhead v. Forth, &c., Ins. Assoc.* [1894], A. C. 72. The point decided was that certain provisions

in the articles of association incorporated by reference into a contract between the plaintiff and the company were binding on the plaintiff, though the articles had not been properly passed.

(*h*) 5 E. & B. 248, and 6 ib. 327.

Bk. II. Chap. 2. directors. C. J. Jervis, in affirming the decision of the Court
Sect. 2. below, said,

"We may now take for granted, that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more⁽ⁱ⁾. And the party here on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done" ^(k).

Omnia præs-
muntur rite
esse acta.

Clarke v. Im-
perial Gas
Company.

Hill v. Man-
chester Water-
works Company.

Smith v. Hull
Glass Company.

This was not the first occasion on which the maxim *omnia præsuntur rite esse acta* had been applied to such cases. In *Clarke v. The Imperial Gas Light and Coke Company* (l), a bond given by the directors of a company under the seal of the company for the payment of an annuity to a retired servant, was presumed to have been executed after due compliance with all conditions; and in *Hill v. The Manchester and Salford Waterworks Company* (m), the same principle was acted upon; although that case rather turned on the inadmissibility of the evidence by which it was sought to show that the requisite formalities had not been complied with. In *Smith v. The Hull Glass Company* (n), Maule, J., whilst recognising the doctrine that all persons who contract with the directors of a registered company must be taken to be cognisant of the extent of the authority conferred upon them, added, "But it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors;" and that learned judge held, that the public were entitled to assume that a person acting as the agent of a company had been duly appointed by the directors; for by the company's deed of settlement, they had power to appoint persons to carry on its business. Again

(i) See acc. as to bye-laws, *Royal Bank of India's case*, 4 Ch. 252; and resolutions of directors, *County of Gloucester Bank v. Rudry Merthyr, &c., Co.* [1895], 1 Ch. 629.

(k) See as to this *Irvine v. Union Bank of Australia*, 2 App. Ca. 366, and *London and New York Investment Corp.* [1895], 2 Ch. p. 871, where

the resolution, if any, would have been registered. See, also, *Landowners' Inclosure Co. v. Ashford*, 16 Ch. D. 411; *Romford Canal Co.*, 24 Ch. D. 85.

(l) 4 B. & Ad. 315.

(m) 5 B. & Ad. 866.

(n) 11 C. B. 897.

in *Agar v. The Athenæum Life Assurance Society* (o), the directors had power to borrow, but only with the consent of an extraordinary general meeting of shareholders. They did borrow by issuing debentures sealed with the seal of the company, and signed by two of themselves; and it was held, that these debentures were binding on the company, although no such authority to borrow had been conferred by a general meeting as was contemplated by the company's deed of settlement (p). In *The Prince of Wales Assurance Society v. The Athenæum Insurance Society* (q), the Court of Queen's Bench held, that a policy of insurance issued under the seal of an insurance society and signed by three of its directors, was binding upon the society, although the issue of the policy had not been authorised by a previous resolution of directors as required by the company's deed.

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Agar v. Athenæum Assurance Society.

Prince of Wales Assurance Society v. Athenæum Insurance Society.

The same principles have frequently been approved and acted upon in Chancery. In *Ex parte The Eagle Company* (r) a claim was made against the Athenæum Assurance Society in respect, not of a policy under its seal, but of an agreement to grant such a policy entered into on behalf of the society by its directors. The Court allowed the claim. The Vice-Chancellor Wood, in delivering judgment, approved of the observations made in *The Royal British Bank v. Turquand* and of the distinction there drawn, between that which upon the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with.

Eagle Company's case.

"Thus, where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company

(o) 3 C. B. N. S. 725. Compare this with *Athenæum Life Ass. Soc. v. Pooley*, 3 De G. & J. 294, and 1 Giff. 102.

(p) See, too, *Hampshire Land Co.* [1896], 2 Ch. 743, where a meeting had passed a resolution, but the resolution was invalid, owing to the meeting not having been properly summoned. *Semble*, the lender had

no notice that any meeting had been held.

(q) 3 C. B. N. S. 756, note. See, too, *Prince of Wales Assurance Soc. v. Harding*, E. B. & E. 183.

(r) 4 K. & J. 549. See, too, *Anglo-Australian, &c., Ass. Co. v. British Provident, &c., Society*, 3 Giff. 521, varied on appeal, 4 De G. F. & J. 341.

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can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company, for instance, resolutions at meetings and the like, if the party contracting with the directors finds the acts which they undertake to do, to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed or the like, otherwise he would be bound to go further back and to inquire whether the meetings have been duly summoned (s), and so ascertain a variety of other matters into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed."

Ex parte Over-
end, Gurney &
Co.

Again in *Ex parte Overend, Gurney & Co. (t)*, a company was held bound by bills accepted by its chairman, although he had only been authorised to accept them on certain conditions which had not been complied with. The bill holder in this case had no notice of the conditions, but even if he had had such notice it would have been no part of his business to see that they had been complied with; he would have been entitled to assume that they had (u).

County of
Gloucester Bank
v. Rudry,
Merthyr, &c., Co.

Again in the *County of Gloucester Bank v. Rudry Merthyr, &c., Colliery Co. (x)*, the directors had under the company's articles of association power to fix the number of directors necessary to form a quorum; by a resolution they fixed three as a quorum; the Court held that a mortgage under the seal of the company, signed by the secretary and countersigned by two directors, was valid, although two directors only were present at the meeting which sanctioned its execution, for a person dealing with the company was not bound to ascertain what resolutions the directors had passed (y),

(s) This of course is not necessary. *Hampshire Land Co.* [1896], 2 Ch. 743.

(t) 4 Ch. 460.

(u) See *per* L. J. Giffard, *ib.* 474, and *Bryant, Powis, &c., Ltd. v. Quebec Bank* [1893], A. C. 170.

(x) [1895], 1 Ch. 629; *D'Arcy v. Tamar Kit Hill, &c., Co.*, L. R. 2 Ex. 158, was distinguished as having turned on special Acts; see, too,

Owen and Ashworth's claim [1900], 2 Ch. 272, and [1901], 1 Ch. 115; *Davies v. R. Bolton & Co.* [1894], 2 Ch. 678, noticed *infra*; and *Duck v. Tower Galvanizing Co.* [1901], 2 K. B. 314.

(y) The same rule applies to a company's private bye-laws. *Royal Bank of India's case*, L. R. 4 Ch. 252.

and was entitled to infer that if the directors had appointed a quorum, the necessary quorum was present. Bk. II. Chap. 2.
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Further illustrations of the same principle are afforded by the cases already noticed in which companies have been held bound by the acts of agents irregularly appointed (z).

In connection with these cases it is necessary to allude to a decision apparently in direct conflict with them, viz., *Peirce v. Jersey Waterworks Company* (a). Peirce v. Jersey
Waterworks
Company. In this case a company was formed and registered under the Companies' Act, 1862, with articles which provided in substance that when 3,000 shares had been allotted the members should be associated for the objects of the company and be all bound by its regulations, as if all the shares had been allotted. Before 3,000 shares were allotted the directors appointed the plaintiff to be the engineer of the company; and he sued the company for his salary, and although he had no notice that the 3,000 shares had not been allotted, he was held not entitled to recover. The Court considered that until 3,000 shares had been allotted no such company existed as the plaintiff could contract with. But the company unquestionably did exist as a corporate body (b); and although the allotment of 3,000 shares may have been a condition precedent to the commencement of the directors' power to bind the company, the cases already alluded to go far to show that the plaintiff was entitled to assume that the condition had been performed. There is, however, a difference between assuming that an agency has commenced and assuming that persons whose agency has commenced are pursuing their authority, and this difference is perhaps sufficient to render the decision in question consistent with those alluded to above (c).

The principles established by the foregoing cases apply, not only as between companies on the one hand and strangers on the other, but also between companies and their members; and it has been held over and over again, as will be seen hereafter, that as between one shareholder and the others the validity of the acts of their directors depends in any Irregularities
as affecting
members of
the company.

(z) *Ante*, pp. 208 and 211.

(a) L. R. 5 Ex. 209.

(b) *Ante*, p. 151.

(c) See the end of Mr. Baron Bramwell's judgment.

Bk. II. Chap. 2. particular case much more on the power of the directors
Sect. 2. to do the acts in question, than on the regularity or
irregularity of the manner in which those acts may have
been done (*d*).

Effect of provisions validating irregularities. Provisions in the regulations of a company to the effect that the acts of directors shall be valid notwithstanding some irregularity in their appointment or touching their authority apply not only between the company and persons dealing with it (*e*), but also between the company and its members (*f*); a provision of this kind will not necessarily cure a radical defect in the appointment of the directors (*g*).

Effect of notice of impropriety. A person who knows or is to be treated as knowing that directors or agents are acting irregularly and improperly cannot hold the company bound by their acts (*h*), unless he claims as an assignee for value from some one who had no notice of the irregularity (*i*), and instruments signed by directors on behalf of a company, in a name which is not that of the company, are improper on the face of them, and do not bind the company (*k*).

Transferees of securities improperly issued. In connection with the subject of notice, it must not be forgotten that transferees of bonds and other ordinary choses in action of that kind, not being negotiable instruments, are *prima facie* in no better position than their transferors (*l*). But a company may be estopped from denying as against a transferee of a security what it might have denied as against the transferor. For example, in *Webb v. Commissioners of*

Webb v. Commissioners of Herne Bay.

(*d*) See in Book IV. under the head Contributories.

(*e*) *Davies v. R. Bolton & Co.* [1894], 3 Ch. 678.

(*f*) *Dawson v. African Consolidated, &c., Co.* [1898], 1 Ch. 6. The dicta of Chitty, J., to the contrary in *Harben v. Phillips*, 23 Ch. D. p. 28, cannot be relied upon.

(*g*) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151. Compare *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350, a decision under the Public Health Act, 1875.

(*h*) See *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696; *Balfour v. Ernest*, 5 C. B. N. S. 601; *Zulueta's claim*, 5 Ch. 444; *Irvin v. Union Bank of Australia*, 2 App. Ca. 366.

(*i*) *Whitworth's claim* [1901], 1 Ch. 115.

(*k*) *Hambro' v. Hull, &c., Ins. Co.*, 3 H. & N. 789.

(*l*) *Athenæum Life Ass. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294; and other cases noticed *infra*, pp. 236-7 and 301-2.

Herne Bay (m), a corporation was empowered by statute to issue debentures but not to members of its governing body. Bk. II. Chap. 2.
Sect. 2. Debentures however were issued to one of such members, and were assigned to a *bonâ fide* holder for value without notice of the impropriety in the issue, and it was held that the corporate body was bound by the debentures, and was estopped from denying their validity as against the plaintiff.

Again in *Davies v. R. Bolton & Co.* (n), the company had power to issue debentures, but the articles provided that the seal of the company was not to be affixed except in pursuance of a resolution of the directors, that the number of directors should not be less than two, that the directors might not act except for the purpose of filling vacancies when their number was below two, and that no director might vote in any matter in which he was personally interested. B. was the only director, and he and the secretary M. issued a debenture to himself, B., and B. transferred it for value to the plaintiff. The debenture was regular on the face of it, being under the seal of the company, and signed by B., and countersigned by M. as secretary, in accordance with the requirements of the articles. The Court held that the plaintiff, though he knew the provisions of the articles of association, had no notice of the irregularities, and was entitled to enforce the debenture. The articles in question contained a special provision that debentures issued for value should bind the company, notwithstanding any irregularity touching the authority of the directors who issued them, and reliance was placed upon this article, but *semble* the decision would have been the same if there had been no such article (o).

Again in the case of the *Romford Canal Co.* (p), some debentures were issued to a contractor with the sanction of a meeting at which an insufficient number of shareholders was present and he knew this. A *bonâ fide* transferee for value without notice of the irregularity was nevertheless held entitled to payment by the company (q).

(m) L. R. 5 Q. B. 642.

(n) [1894], 3 Ch. 678.

(o) See *ib.* pp. 688, 689.

(p) *Carew's claim*, 24 Ch. D. 85.

L.C.

(q) See, too, as to debentures or documents transferable free from equities, *Ex parte City Bank*, 3 Ch. 758; *Ex parte Colborne and Strav-*

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Whitworth's
claim.

Moreover securities which have been irregularly issued to a person who has no notice of the irregularity, and is entitled to enforce them against the company, will be valid as against the company in the hands of a *bonâ fide* transferee for value who had notice of the irregularity. Thus in *Whitworth's claim* (r), the company's regulations provided that its business should be managed by a council consisting of not less than three persons. The council was however empowered to act notwithstanding a vacancy and to fix a quorum. No quorum was fixed, and when the council had been reduced to two, these two borrowed money for the company from its bankers, and gave securities on the company's property for the loan. The bank had no notice of any irregularity; subsequently one of the two members of the council paid the debt due to the bank and took a transfer of it and of the securities to himself. It was held that he was entitled to payment by the company.

Formalities
required by
law.

The observations made above respecting the validity of contracts, &c., entered into by directors in contravention of a company's regulations, have no application to cases in which contracts are required by law to be in a particular form, and that form is not observed. The formalities which must be complied with in order to render contracts binding upon companies will be noticed hereafter (t), and it will then be seen that whether these formalities are required by statute or by the common law, contracts not in the form prescribed are altogether invalid, unless they can be upheld on the equitable principles relating to part performance.

SECTION III.—IMPERATIVE AND DIRECTORY CLAUSES IN COMPANIES' STATUTES AND REGULATIONS.

A statute may require an act to be done in a particular way and yet not render the act null and void if not done in the way prescribed. Whether invalidity of what is done is a consequence of a departure from the terms of the Act or not

bridge, 11 Eq. 478, and cases *infra*, (r) [1901], 1 Ch. 115, affirming on pp. 300-302, and Bk. IV., c. 1, this point [1900], 2 Ch. 272.
§§ 12. 3. (t) *Infra*, c. 4.

depends on its true interpretation, and this again depends on the wording of the statute and on the object sought to be attained by it. Statutes are said to be *imperative* when they render null and void what is done contrary to their provisions; and to be *directory* when the consequence of disregarding them is not the nullity of what is done but something different. The following cases illustrate the distinction in question :—

By the 4 Geo. 4, c. 76, § 16, it was enacted that the father, if living, of any party under twenty-one years of age, should have authority to give consent to the marriage of such party, and if the father was dead, then that other persons mentioned in the Act should have such authority; and the Act then went on thus: "And such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorised to give such consent." A person who was under twenty-one, and whose father was living, married without his consent. It was held that the marriage was nevertheless valid; for the legislature evidently did not intend to bastardise the issue of a marriage solemnised without the consent required (*u*). Again, it has been held that a covenant by a municipal corporation to repay money borrowed, is valid, although the money is not borrowed for any purpose to which the borough fund is made applicable by the Municipal Corporations Act, and although the deed containing the covenant has not been approved by the Lords of the Treasury as required by the same Act (*x*). So it was held, that a rate made under the Public Health Act of 1848 was valid, although that statute requires all rates made or collected under it, to be published in the same manner as poor-rates, and the rate in question had not been published in the manner required (*y*). So it was held, that an order by the Secretary of State under § 6 of the Coal Mines Regulation Act, 1896, was valid although that statute requires notice of the order to be given in such manner as the Secretary of State shall direct, and no notice of the order had been given (*z*).

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Examples of directory statutes,
R. v. Birmingham.

Payne v. Brecon.

Le Feuvre v. Miller.

Jones v. Robson.

In each of these cases, the statute in question was said to be directory only; and to each of them the maxim *Fieri non debuit sed factum valet*, was held applicable. In each case something was to be done in a particular manner; but whatever may have been the consequences of doing it in some other manner, the invalidity of what was done was not one of

(*u*) *R. v. Birmingham*, 8 B. & C. 29.

(*x*) *Payne v. Brecon*, 3 H. & N. 572.

(*y*) *Le Feuvre v. Miller*, 8 E. & B. 321. Compare *British Insulated Wire*

Co. v. Prescott Urban District Council [1895], 2 Q. B. 463 and 538, which decided that § 174 (2) of the Public Health Act, 1875, is imperative.

(*z*) *Jones v. Robson* [1901], 1 Q. B. 673.

Bk. II. Chap. 2. those consequences; and this appears to be the test whereby
Sect. 3. -- to decide whether a law is directory or imperative as those
terms are customarily employed (a).

Statutes which are directory only are common enough, but it is not easy to recognise them with certainty before they have been judicially interpreted. There is, however, a natural tendency on the part of Courts of justice to uphold an honest transaction although somewhat irregular, if to do so is consistent with the true interpretation of the statute which has to be construed. The following illustrations of clauses held to be directory will serve as guides in other cases.

Examples of so-called directory clauses.

Foss v. Harbottle.

Holding of meetings.

In *Foss v. Harbottle* (b), an Act of Parliament incorporating the Victoria Park Company, declared that it should be in the power of a certain number of shareholders, acting in a certain manner, and observing certain forms, to require the directors to convene extraordinary meetings, and in case of their default, to convene such meetings themselves. A question having arisen how far it was necessary to adhere strictly to the letter of the enactment, in order to give validity to the acts of a meeting convened under it, the Vice-Chancellor, Sir James Wigram, expressed a strong opinion that the acts of a meeting convened in substantial compliance with the statute would be valid, although all the prescribed forms had not been observed. He considered the statute to be in this respect directory only.

Quorum of directors.

In *The Thames Haven and Dock Railway Company v. Rose* (c), a private Act of Parliament directed that the business of a company should be carried on by twelve directors, of whom five should be a quorum; and the Court of Common Pleas was of opinion that the Act was in this respect directory only, and that calls made by five out of seven directors, there being no more, were valid (d). On the other hand, it has been decided that if the company's regulations contain a clause that the number of directors shall not

(a) For further information on this subject the reader is referred to Maxwell on the Interpretation of Statutes, c. 12.

(b) 2 Ha. 461. Compare *State of Wyoming Syndicate* [1901], 2 Ch. 431, a decision under § 13 of the

Companies Act, 1900.

(c) 4 Man. & Gr. 552, note that there was a sufficient number to form a quorum.

(d) Compare other cases cited ante, pp. 205-208.

be less than a certain number, and do not contain any clause enabling continuing directors to act, notwithstanding a vacancy, such regulations are imperative (e). In *D'Arcy v. Tamar Kit Hill, &c., Co.* (f), the Court held that the Companies Clauses Consolidation Act, 1845, and the company's special Act imperatively required a meeting of directors in order that the quorum might act, and that a deed to which the company's seal had been affixed, with the authority of a quorum of directors given separately, without having met, was invalid.

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Again, it has more than once been held, that when a company is incorporated by charter, or Act of Parliament, which directs the observance of certain forms before the corporate seal is annexed to contracts purporting to bind the body corporate, a contract under the corporate seal, and of a kind authorised by the charter or statute, is binding on the corporation, although the seal may have been annexed without the observance of the prescribed formalities (g).

Cases where a document has been informally sealed.

So, in the case of an ordinary joint-stock company, the deed of settlement of which declared that all cheques on its bankers were to be signed by three directors, and the directors drew cheques signed by less than three of them, it was held that this irregularity did not affect the right of the directors to be allowed as between themselves and the shareholders the sums drawn out, such sums having been *bonâ fide* applied for the purposes of the company (h).

Signatures of cheques.

So, clauses relating to the mode of signing minutes of meetings, keeping registers, and making returns, so as to render them admissible in evidence without preliminary proof, are considered as directory only (i).

Signature of minutes.

So, too, that portion of Art. 62 in Table A. which says that

(e) *Kirk v. Bell*, 16 Q. B. 290 (deed void); *Bottomley's case*, 16 Ch. D. 681 (call invalid); *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350, election of members of a local board.

327, and 5 E. & B. 248; *Agar v. The Athenæum Life Assurance Society*, 3 C. B. N. S. 725.

(f) L. R. 2 Ex. 158, and compare cases, *ante*, p. 208.

(h) *Ex parte Bignold*, 22 Beav. 143. Compare *Ex parte Agra and Masterman's Bank*, 6 Ch. 206; *Ex parte Birmingham Bank Co.*, 3 Ch. 651.

(g) See *Fountain v. Curmarthen Rail. Co.* 5 Eq. 316; *The Royal British Bank v. Turquand*, 6 E. & B.

(i) See *ante*, pp. 75, 144, and 149, as to registers and returns, and *infra*, Book III., c. 1, as to minutes of meetings.

Bk. II. Chap. 2. if at any meeting at which an election of directors ought to
 Sect. 3. take place the places of the vacating directors are not filled up, the meeting shall stand adjourned, has been held to be directory only (*k*).

Borrowing
 money.

As regards borrowing money, statutes limiting the amount which may be borrowed are always regarded as imperative, as will be seen hereafter (*l*) ; but a statute authorising money to be borrowed with the consent of a general meeting was, as to this, held directory only (*m*). A similar construction was put on a statute which gave the company power to borrow in certain events, but "not without" the authority of a general meeting (*n*).

Non-registry of
 securities.

Sect. 43 of the Companies Act, 1862, which directs limited companies to keep registers of all mortgages and charges has been held to be directory only ; and an unregistered mortgage, even to a director of the company, is not invalid (*o*). The requirements of the Companies Act, 1900, in this respect are, however, imperative (*p*).

Companies Act,
 1900, § 6.

The provisions of the Companies Act, 1900, which prohibit any company registered under the Companies Acts after the 31st December, 1900, where there is an invitation to the public to subscribe for its shares, from commencing business or exercising any borrowing powers until certain conditions have been fulfilled, have been already noticed (*q*). Contracts entered into before the date when the company is entitled to commence business are provisional only ; but suppose the directors have borrowed money for the company, and given security to the lender, before that date, will the lender be unable to enforce his security or recover the money from the company if the company never becomes entitled to commence business ? It may be that the statute will be held to be

(*k*) *Ex parte Kennedy*, 44 Ch. D., p. 482.

(*l*) *Infra*, p. 286 *et seq.*

(*m*) *Landowners, &c., Inclosure Co. v. Ashford*, 16 Ch. D. 411.

(*n*) *Fountaine v. Carmarthen Ry. Co.*, 5 Eq. 316 (a decision on §§ 39 and 40 of the Companies Clauses Consolidation Act, 1845). See, too,

Hampshire Land Company [1896], 2 Ch. 743, where the expression was "unless" the borrowing be authorised.

(*o*) *Wright v. Horton*, 12 App. Ca. 371.

(*p*) See § 14 and *infra*, p. 311 *et seq.*

(*q*) *Ante*, p. 209.

directory only, and that the security will be good and the lender able to recover the money from the company if he had no notice of the impropriety of the transaction (*r*). It is, however, apprehended that the lender—at any rate, if he knows or has notice that an invitation to the public to subscribe for shares has been, or is about to be issued—will be fixed with notice (if it is the fact) that the requisite statutory declaration has not been filed with the registrar, for if it is filed he has a right to see it (*s*); and, if a prospectus inviting the public to subscribe for shares has been issued and filed (*t*), with notice of this fact also (*u*). Bk. II. Chap. 2.
Sect. 4

On the other hand, a clause in a company's regulations requiring proxy papers to be attested has been held to be imperative, and proxy papers not so attested were rejected (*x*). Proxy papers.

Rules of building societies governed by the Building Societies Act, 1874, which provide that disputes between members shall be referred to arbitration, are imperative, and the Court has no power to decide questions which fall within the rules (*y*). Arbitration
clauses.

These cases are not to be confounded with those in which shareholders and companies have been held estopped from taking advantage of the non-observance of formalities. Such cases do not turn upon whether the clauses prescribing the formalities are directory or imperative; but upon the very different question, whether, supposing them to be imperative, the invalidity of what has been done informally can be insisted on by those who have always treated it as valid, and induced others to do the same. Cases of estoppel
to be distin-
guished.

SECTION IV.—OF RATIFICATION BY COMPANIES.

When a contract has been entered into on behalf of a company informally, but has been acted upon and is then disputed by the company, the question naturally arises Ratification by
companies.

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| <p>(<i>r</i>) See <i>Fountain v. Carmarthen Ry. Co.</i>, <i>supra</i>, note (<i>n</i>).</p> <p>(<i>s</i>) Companies Act, 1862, § 174 (5).</p> <p>(<i>t</i>) Companies Act, 1900, § 9.</p> <p>(<i>u</i>) <i>Irvine v. Union Bank of Australia</i>, 2 App. Ca. 366; <i>London and New York Invest. Corp.</i> [1895], 2</p> | <p>Ch. p. 870.</p> <p>(<i>x</i>) <i>Harben v. Phillips</i>, 23 Ch. D. 14, a dispute between shareholders.</p> <p>(<i>y</i>) <i>Norton v. Counties Conservative, &c., Bldg. Socy.</i> [1895], 1 Q. B. 246, overruling <i>Christie v. Northern Counties Bldg. Socy.</i>, 43 Ch. D. 62.</p> |
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whether it has not been ratified or otherwise agreed to by the company, and so become binding on it. In order to answer this question, regard must be had first of all to the nature of the contract. If it is one by which the company would not have been bound, even if all proper formalities had been observed, ratification by the directors can be of no avail as against the company; nor will ratification or adoption by the shareholders be of any avail against the company, if the contract in question is one into which the company has no power to enter (z). But if the contract would have been binding on the company, if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification or adoption by a new agreement by or on behalf of the company is perfectly possible; and the only question for determination then is, whether the contract has been effectually ratified or adopted or not (a).

Acts done before
the formation of
the company.

A contract entered into or an act done before a company is formed cannot be ratified by it in the proper sense of that expression. Ratification is a technical word and presupposes the existence—1, of a principal; 2, of an agent; and 3, of some act done by the agent for and on behalf of the principal, but without his authority (b). Where there is no principal there can be no agent and no act done by him for his principal, and consequently there can be no ratification—i.e., approval by him of something previously done for him. A company therefore cannot, properly speaking, ratify what its promoters have done before its formation (c). But a company

(z) *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, noticed *ante*, p. 216. See, also, *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696, at p. 711; *Blackburn Benefit Society v. Cunliffe, Brooks & Co.*, 29 Ch. D. 902; *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 675, n.; *Imp. Bank of China, &c. v. Bank of Hindustan*, 6 Eq. 91; *Phoenix Life Ass. Co.*, 2 J. & H. 441; *The Era Co.'s case*, 2 J. & H. 408; 1 De G. J. & S. 29, and 1 Hem. & M. 672.

(a) *Irvine v. Union Bank of Aus-*

tralia, 2 App. Ca. at p. 374, noticed *infra*.

(b) *Wilson v. Tummam*, 6 Man. & Gr. 236. The agent must at the time profess to be acting on behalf of a principal, *Keighley, Macsted & Co. v. Durant* [1901], A. C. 240, reversing *Durant & Co. v. Roberts and Keighley, Macsted & Co.* [1900], 1 Q. B. 629.

(c) See acc. *Browne v. La Trinidad*, 37 Ch. D. 1; *Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Bayot Pneumatic, &c., Co. v. Clipper, &c.*,

may after its formation become bound to do what others have undertaken it shall do when formed. It may become so bound by its charter or Act of incorporation, or by a valid contract entered into by itself after its formation, and this is what is meant by adoption; but it will not become so bound merely by introducing into its memorandum or articles of association a clause (*d*), or by passing a resolution (*e*) purporting to adopt the contract. This subject, so far as regards charters and Acts of incorporation, has been already examined (*f*), and as regards contracts made by the company after its formation, the reader is referred to § 2 of the present chapter, and to *Howard v. Patent Ivory Manufacturing Co.* (*g*), where a company was held bound by debentures issued by it pursuant to arrangements made before it was formed. But the new contract must be with (*h*), or create a trust in favour of (*hh*) the person who seeks to sue on it, and must, of course, be itself *intra vires*, or it will be worthless.

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Howard v. Patent Ivory Manufacturing Co.

A company may be so affected by the knowledge of misrepresentations made before its formation as to give a person entering into a contract on the faith of such misrepresentations a right to rescind (*i*).

Acts done by the agents of a company since its formation can be ratified by it, provided they are not *ultra vires* the company (*k*).

Acts done since the formation of the company.

Co. [1901], 1 Ch. 196; *Empress Engineering Co.*, 16 Ch. D. 125; *Hereford & S. Wales, &c., Co.*, 2 Ch. D. 621; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, ib. 255; *Gunn v. London & Lancashire Fire Insur. Co.*, 12 C. B. N. S. 694. *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368, is overruled, see 16 Ch. D. p. 130. Compare *Howard v. Patent Ivory Manufacturing Co.*, noticed *infra*.

(*d*) *Ante*, pp. 197 and 198, notes (a) and (b).

(*e*) *North Sydney, &c., Co. v. Higgins* [1899], A. C. 263; *Johannesburg Hotel Co.* [1891], 1 Ch. 119.

(*f*) *Ante*, p. 196.

(*g*) 38 Ch. D. 156. Compare case

in next note. See *Ex parte Watson*, 21 Q. B. D. 301, where the deposit note was given in discharge of a debt not due from the society.

(*h*) *Bugot Pneumatic, &c., Co. v. Clipper Pneumatic, &c., Co.* [1901], 1 Ch. 196, distinguishing *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156.

(*hh*) See *Touche v. Metropolitan Railway, &c., Co.*, 6 Ch. 671.

(*i*) See *Karberg's case* [1892], 3 Ch. 1, *ante*, pp. 95 and 96.

(*k*) *Ante*, p. 218 *et seq.*; *V.-C. Bacon in London Financial Ass. v. Kelk*, 26 Ch. D. 146 and 151, seems to go even further if the question of *ultra vires* is doubtful.

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Moreover, although a company's articles cannot be altered for the future without a special resolution duly passed and confirmed, an act done by the directors contrary to the articles as they stand may be ratified by the shareholders without altering the articles, and without any such special resolution as their alteration requires (*l*).

A ratification, to be imputable to a company, must be made directly by its shareholders or indirectly through their agents acting within the limits of their real or apparent authority; and in order that ratification by the shareholders or their agents may be proved, it must be shown—

1. That the parties alleged to have ratified the contract knew what it was; or, having their attention drawn to it, did not choose to inquire into it (*m*).

2. That they have in some way recognised it as binding.

If these two essential points are established, there will still remain for consideration the question whether the recognition and adoption have been in proper form. Each of these matters requires a few observations.

1. As to knowledge.

First, as to knowledge. Where the contract is one which it is competent for the directors to make, it is also one which it is competent for them to ratify; and in such a case knowledge by them is for the purpose in question equivalent to knowledge by the company (*n*). The case of *Smith v. Hull Glass Co.* (*o*) is a leading authority on this head, and has been followed by others which have been already referred to (*p*). Where, however, the contract is one which it is not competent for the directors to make, ratification by them is of no avail; and knowledge on their part of what is being done under the contract is not equivalent to knowledge on the part of the company. In such a case as this, ratification on the part of the shareholders must be proved, in order to

(*l*) *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 135. See, also, *Irvine v. Union Bank of Australia*, 2 App. Ca. 366. Compare *Clay v. Rufford*, 5 De G. & S. 760.

(*m*) See *La Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111; *Marsh v. Joseph*

[1897], 1 Ch. p. 246.

(*n*) Implied knowledge from the books of the company, but which they never saw, is not enough. See *Cartmell's case*, 9 Ch. 691.

(*o*) 8 C. B. 668, 11 ib. 897.

(*p*) See *ante*, p. 211, and *Grady's case*, 1 De G. J. & Sm. 488.

establish ratification by the company (*q*). But even in this case, it will be inferred as against the shareholders, from comparatively slight circumstances, that they were cognisant of what it was the duty of the directors to bring before them (*r*).

As in ordinary cases of agency a principal may ratify his agents' acts without inquiring into them, so shareholders who have their attention fairly drawn to what the directors have done may ratify their acts without knowing all the circumstances attending them. Ratification on the part of all the shareholders will be inferred if the acts are such as all can ratify; if the attention of them all, or of such of them as choose to attend, has been fairly called to the acts in question (*s*), and if those acts have been permitted to be done or acted upon for any length of time without being called in question. Although cases exist which are extremely difficult to reconcile with this principle (*t*), the principle itself will be found recognised even in those cases which have been decided not to fall within it (*t*). Others have been decided in accordance with it (*u*). A leading case on this subject is *The Phosphate of Lime Co. v. Green* (*x*), in which it was held in effect:

1. That a purchase of shares by the directors of a company out of its funds was beyond the powers of the directors (*y*).
2. That the money paid for them might have been recovered by the company but for the subsequent ratification of the transaction.
3. That the company ought to be treated as having ratified the transaction, as it was fairly brought to the attention of the shareholders (*z*), and had been allowed

Knowledge by shareholders not always essential.

Phosphate of Lime Company v. Green.

(*q*) *Athenæum Life Assur. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. See, also, *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Burges and Stock's case*, 2 J. & H. 441.

(*r*) See *Lane's case*, 1 De G. J. & S. 504.

(*s*) Of course this is essential. See *Irvine v. Union Bank of Australia*, 2 App. Ca. 366; *Blackburn, &c., Building Society v. Cunliffe, Brooks & Co.*, 29 Ch. D. 902, at p. 910; *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 125.

(*t*) *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263.

(*u*) *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Brotherhood's case*, 31 Beav. 365, and 8 Jur. N. S. 926, on appeal; and the case next cited.

(*x*) L. R. 7 C. P. 43. See, also, *London Financial Ass. v. Kelk*, 26 Ch. D. 107.

(*y*) It was really beyond the powers of the company, but this was overlooked. See *Trevor v. Whitworth*, 12 App. Ca. 409.

(*z*) Opinions might reasonably

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Ratification for
past not equivalent
to authority
for the future.

Irvine v. Union
Bank of Australia.

Ratification of
directors in case
of fraud on the
shareholders.

to pass unquestioned for five years, and had been treated as valid in other arrangements since made by the company.

A ratification of a past irregular act does not of itself authorise a repetition of a similar act; and it may happen that whilst an ordinary meeting of shareholders may suffice to ratify what has been done, a different kind of meeting is required to confer an authority to do the like in future. This is well illustrated by *Irvine v. Union Bank of Australia* (a), in which the directors of a Rice Company were empowered by its articles of association to borrow money to an extent not exceeding one half of its paid-up capital. The directors borrowed more than this from a bank which had notice of the restriction, and that the articles had not been altered by proper authority (b). The company was held not liable for the sum thus borrowed in excess of the directors' powers, although the shareholders had ratified a similar transaction two years before.

A ratification by the directors is not a ratification by the company where the ratification relates to an act done by the directors in fraud of the shareholders, and the person relying on such ratification was party to the fraud (c). Therefore, if directors of a company fraudulently issue debentures under the seal of the company to a person privy to the fraud, and the issue of such debentures is entered in the company's books, and interest upon the debentures is regularly paid, but the shareholders are kept in ignorance of the entry and payments, the company is no more bound by ratification than

have differed upon this point, as the allusion to the transaction in question was somewhat misleading.

(a) 2 App. Ca. 366. *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 135.

(b) The notice of the restriction was given by the articles of association; an alteration of them could only be made by a registered special resolution. The bank was therefore treated as having had notice as stated in the text. The report does not state that the bank had notice

that the limit was in fact exceeded, but the writer assumes that it had.

(c) So an entry in the books of a bank, by its manager, making it appear that a debt due from him is due from the bank, does not bind the bank. *La Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111. As to transactions between directors and the company see *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 393, and *infra*, Bk. III., c. 2, § 2.

by the original issue of the debentures. And inasmuch as a debenture is a chose in action, and apart from special circumstances (*d*) only confers upon its assignee the title of its assignor, even a *bonâ fide* purchaser for value, without notice of any fraud, is in no better position against the company than the original payee; and the purchaser's position against the company is not improved by the recognition of his title by its directors (*e*). But, as before observed, a company may be estopped from denying as against a transferee the validity of an instrument it might impeach if in the hands of his transferor (*f*).

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Secondly, with respect to the mode of recognition and adoption. Assuming a contract to be one which the directors of a company have power to enter into, and that it has been entered into irregularly, and has been acted upon with their knowledge, then, upon the principles already explained, the company ought to be deemed to have ratified the contract in question, and to be bound by it, unless some particular form of ratification is required by law, and that form has not been observed. It has been already seen that the non-observance of particular formalities prescribed by companies' deeds of settlement and regulations is immaterial as regards persons

2. Mode of
recognition.

(*d*) Debentures may by the terms of their issue be assignable free from the equities between the company and the original or any subsequent owner. See *Farmer v. Goy & Co., Ltd.* [1900], 2 Ch. 149; *Blakeley Ordnance Co.*, 3 Ch. 159; *Ex parte Asiatic Banking Corporation*, 2 Ch. 397; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 385; and other cases, *infra*, p. 300-302.

(*e*) *Athenæum Life Ass. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. This case was followed in *Wood's claim* and *Brown's claim*, 9 W. R. 366, and 10 ib. 662. See, too, *Burges and Stock's case*, 2 J. & H. 441. Compare *Woodhams v. Anglo-Australian Co.*, 3 Giff. 238; *The Magdalena Steam Nav. Co.*, Johns.

690; *Hulett's case*, 2 J. & H. 306, where the shareholders were not kept in ignorance of what had been done. *The Athenæum Life Ass. Society v. Pooley* appears at first sight to be opposed to *Agar v. Athenæum Life Ass. Society*, 3 C. B. N. S. 725; for in the latter case judgment was recovered in an action at law upon one of a set of debentures, whilst in the former case others of the same set were held invalid. In the action at law, however, the only plea was *non est factum*, and no question of fraud, even if there was any in that case, was raised. But in the suit in equity the debenture was impeached for fraud, and was set aside on that ground.

(*f*) *Ante*, p. 224.

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dealing *bonâ fide* with the directors without notice of the non-observance of the forms; and several instances have been already referred to in which informal contracts have been held binding on companies on the ground that they have been acted on with the knowledge of the directors (g). A greater difficulty, however, arises where the formalities in question are required to be observed by law as distinguished from agreement between the parties. If informal ratifications of contracts informally entered into were in such cases held valid, the law requiring the observance of the formalities would be practically repealed. Upon this ground it is that the old rule of the common law that a body corporate can only be bound by instruments under its common seal has been so rigidly adhered to, even where the corporation has had the benefit of the contract (h). But even here, as will be seen hereafter, the equitable doctrines of part performance may come into operation and render the contract binding.

Effect of
ratification.

Ratification, speaking generally, relates back to the act ratified, and is equivalent to a prior authority (i). This rule has been held to enable a principal to ratify the acceptance by a person purporting to act as his agent of an offer made to him but subsequently withdrawn before the ratification (k). But this decision presents difficulties, and has been adversely criticised (l).

(g) *Ante*, pp. 218-226.

(h) *Infra*, c. 4.

(i) See Broom's Legal Maxims (7th ed.), 656 *et seq.*

(k) *Bolton Partners v. Lambert*, 41 Ch. D. 295; *Ex parte Badman*, 45 Ch. D. 16; and compare with the last case, *Portuguese Consol., &c.*,

Mines, Ltd., 42 Ch. D. 160, where the attempted ratification was itself invalid.

(l) See Fry Specific Performance (3rd ed.), Appx. A; *Fleming v. Bank of New Zealand* [1900], A. C. p. 587; Grotius, Bk. II., c. xi., § 18 (2).

CHAPTER III.

OF THE LIABILITIES OF COMPANIES FOR THE ACTS OF THEIR
AGENTS IN PARTICULAR CASES.

RECAPITULATING the results arrived at in the foregoing pages, it may be taken as settled that,—

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Recapitulation.

1. Companies can only be bound by the acts of their real or ostensible agents.

2. The agents of a company cannot bind it by any act which the company as a body has no power to do.

3. The agents of a company can bind it by all acts which can be shown to be within the limits of the authority really conferred upon them :

4. And also by acts, which, although not themselves authorised, belong to a class which is ; and which acts, therefore, may be authorised for anything that can be learned to the contrary by an examination of the authority conferred.

5. As regards acts of this last description, the neglect of directors to observe the provisions of their company's deed of settlement or regulations is a matter which does not concern a person dealing with them *bonâ fide* without notice of the non-observance of those provisions.

6. The above rules apply as well to ratifications of contracts previously entered into as to other matters.

7. But a company cannot ratify acts done before it came into existence ; although it may bind itself by a new contract, or be bound by its Act of incorporation, to perform them.

8. Where particular formalities are required to be observed by law in order that a contract may be binding, an informal ratification of an informal contract is of no avail, except in the limited class of cases to which the equitable doctrines of part performance are applicable.

9. But as regards matters which are not beyond the powers of all the shareholders, they or the company will be held to

Bk. II. Chap. 3. have ratified what they might have disputed, provided their
Sect. 1. attention has been fairly called to it, and they have not chosen to question it.

It is necessary to illustrate the application of these general principles to particular cases.

SECTION I.—CASES NOT INVOLVING ANY TORT OR FRAUD.

Admissions.

Admissions.—Admissions made by the servants and officers of a company in the course of their business and relating to matters which it is their duty to transact are admissible in evidence against the company (a). But not other admissions. In *The Devala Provident Gold Mining Company's case* (b), a speech by the chairman of a meeting to the shareholders of a company admitting that the prospectus was false, was held inadmissible against the company in a proceeding to set aside an allotment of shares applied for on the faith of the prospectus. So an admission by a liquidator was held insufficient proof of facts relied on for the purpose of setting aside an amalgamation (c).

Devala, &c.,
Mining Co.'s
case.

See further, *infra*, *Representations*.

Amalgamation
of companies.

Amalgamation.—Amalgamation is a word without any definite meaning (d). A power to amalgamate may authorise a sale of the company's business for shares in another company (e). Directors of companies have no power to amalgamate their respective companies unless such power is expressly or impliedly conferred upon them.

General powers of management do not include a power to purchase the business of another company (f), or to sell the

(a) See *Bell v. L. & N. W. Rail. Co.*, 15 Beav. 448; *Meux's Exors. case*, 2 De G. M. & G. 522; and *Barnett, Hoares & Co. v. South London Tramways Co.*, 18 Q. B. D. 815.

(b) 22 Ch. D. 593.

(c) *Empire Corporation*, 17 W. R. 431.

(d) *Shrewsbury & Birmingham Ry. Co. v. Stour Valley Rail. Co.*, 2 D. G. M. & G. 866; *Higg's case*, 2 H. & M. 666; *Ex parte Bagshaw*, 4 Eq. 347; *New Zealand Gold Extrac-*

tion Co. v. Peacock [1894], 1 Q. B. p. 627; *Wall v. London & Northern Assets Corp.* [1898], 2 Ch. 469; *Foster v. Borax Company* [1901], 1 Ch. 326 and [1899], 2 Ch. 180. As to its meaning in the Railway Clauses Act, see 26 & 27 Vict. c. 92, § 37.

(e) *Wall v. London & Northern Assets Corp.* [1898], 2 Ch. 469.

(f) *Ernest v. Nicholls*, 6 H. L. C. 401. See, too, *Gilbert v. Cooper*, 10 Jur. 580; *Beman v. Rufford*, 1 Sim.

business of one's own company (*g*). Whether such a power can be conferred on directors by a meeting of shareholders has been much discussed, and is scarcely yet settled. Such a purchase generally involves the assumption by the purchasing company of the debts and liabilities of the selling company, and it is difficult to hold that a transaction of this kind is one as to which a majority ought to be able to bind a minority (*h*). Bk. II. Chap. 3.
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The amalgamation of life insurance companies is now governed by 33 & 34 Vict. c. 61, as amended by 35 & 36 Vict. c. 41. These Acts are printed in the Appendix.

The union of incorporated building societies is governed by the Building Societies Act, 1874, § 33; the Building Societies Act, 1877, § 5; and the Building Societies Act, 1894, § 19; and of registered Industrial and Provident Societies by the Industrial and Provident Societies Act, 1893, §§ 53 and 54.

See further *infra*, *Sales*, and Book IV., c. 3.

Arbitration.—The question whether the directors of a company can bind it by agreeing to refer a dispute to arbitration has not been decided. But the power to bring and defend actions involves a power to compromise them. Arbitration by
companies.

See *infra*, *Compromise*.

By the Railway Companies Arbitration Act, 1859 (*i*), railway companies are empowered to refer to arbitration any matters in which they are mutually interested, and which they might

N. S. 550; *Clay v. Rufford*, 5 De G. & Sm. 768; and see the next two notes.

(*g*) See *Ex parte The Liquidators of the British Nation, &c., Association*, 8 Ch. D. 679.

(*h*) Compare upon this subject the judgments in the cases of the *Era Assurance Soc.*, 2 J. & H. 400; and of the *Saxon Life Assurance Soc.*, *ib.* 408, and 1 De G. J. & Sm. 29, and 1 Hem. & M. 672. See, also, *Kearns v. Leaf*, and *Aldebert v. Kearns*, 1 Hem. & M. 681. In *Ex parte Bagshaw*, 4 Eq. 341; *Anglo-Australian Assurance Co. v. British Prov. Life, &c., Soc.*, 3 Giff. 521, and 4 De G. F. & J. 341, the power to

purchase was conferred by the deed of settlement, and see *Argus Life Ass. Co.*, 39 Ch. D. 571. But even an express power to amalgamate does not enable directors to force their own shareholders to take shares in another company. *Higg's case*, 2 Hem. & M. 657; *Ex parte Bagshaw*, 4 Eq. 341, and see, as to the construction of such powers, *Stace and Worth's case*, 4 Ch. 682; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, and 222.

(*i*) 22 & 23 Vict. c. 59. See *L. C. & D. Rail. Co. v. S. E. Rail. Co.*, 40 Ch. D. 100, as to jurisdiction of the Court.

Bk. II. Chap. 3. lawfully settle by agreement amongst themselves. By the
 Sect. 1. Companies Act, 1862 (*k*), companies governed by that Act are also empowered to refer disputes with other companies or persons to arbitration, in accordance with the Railway Companies Arbitration Act, 1859; but disputes with reference to the price to be paid for the purchase of the interest of any member who dissents from any resolution authorising a sale of the company's property under § 161 of the Companies Act, 1862, are to be settled by arbitration in accordance with the Companies Clauses Consolidation Act, 1845 (*l*).

The Building Societies Act, 1874, § 16 (*g*), authorises societies established under that Act to make rules requiring disputes between the society and its members (*m*) to be settled by arbitration. If a rule to this effect is made, disputes which fall within the rule must be so settled, and the Court has no jurisdiction to decide them (*n*).

Where a company has entered into an agreement which is *ultra vires*, any agreement to refer disputes arising out of it to arbitration is equally *ultra vires* (*o*).

Bills of com-
 panies.

Bills of exchange and promissory notes.—Whether directors, secretaries, or managers of companies have implied power to bind the companies to which they belong by bills of exchange and promissory notes, depends partly on the statutes relating to the privileges of the Bank of England (*p*). But where these statutes do not apply the power depends on the nature of the company. If its business is such that it cannot be carried on in the ordinary way without the use of bills, &c., its directors have power to draw, accept, and indorse them in the name and on behalf of the company (*q*), in the ordinary course of the

(*k*) §§ 72 and 73.

(*l*) See § 162 and 8 & 9 Vict. c. 16, §§ 128–134.

(*m*) As to what disputes are within the section, see the Building Societies Act, 1884, § 2 and Appendix III.

(*n*) *Norton v. Counties Conservative, &c., Bldg. Soc.* [1895], 1 Q. B. 246, overruling *Christie v. Northern Counties Bldg. Soc.*, 43 Ch. D. 62.

(*o*) *Maunsell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130.

(*p*) As to which see *ante*, p. 186, note (*m*).

(*q*) See *per* Parke, B., and Rolfe, B., in *Mayor of Ludlow v. Charlton*, 6 M. & W. 821, and *per* Best, J., in *Broughton v. Manchester and Salford Waterworks Co.*, 3 B. & A. 1. See, also, *Murray v. East India Co.*, 5 ib. 204; *Peruvian Rail. Co. v. Thames, &c., Ins. Co.*, 2 Ch. 617; *Ex parte City Bank*, 3 Ch. 758.

company's business (*r*). But if its business is not of this description, there is *primâ facie* no such power (*s*). This has been decided in the cases of a salvage company (*t*), a mining company (*u*), a gas company (*x*), a washing company (*y*), a salt and alkali company (*z*), a waterworks company (*a*), a cemetery company (*b*), a railway company (*c*).

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An express authority to draw bills of exchange, &c., in connection with the purchase of goods does not necessarily authorise the borrowing of money by such means (*d*).

Where the directors of a company have power to bind it by bills and notes, a bill or note issued by them improperly but in the name of the company, is binding on it in favour of any *bonâ fide* holder for value without notice of the impropriety (*e*).

If an agent accepts or indorses "per pro," the taker of the bill or note so accepted or indorsed runs the risk of the agent

(*r*) *Simpson's claim*, 36 Ch. D. 532.

(*s*) The Bills of Exchange Act, 1882, does not extend the power. See § 22 (1).

(*t*) *Thompson v. Universal Salvage Co.*, 1 Ex. 694.

(*u*) *Dickinson v. Valpy*, 10 B. & C. 128; *Brown v. Byers*, 16 M. & W. 252.

(*x*) *Bramah v. Roberts*, 3 Bing. N. C. 963.

(*y*) *Neale v. Turton*, 4 Bing. 149.

(*z*) *Bult v. Morell*, 12 A. & E. 745; see the judgment of Coleridge, J.

(*a*) *Broughton v. Manchester, &c., Waterworks Co.*, 3 B. & A. 1.

(*b*) *Steele v. Harmer*, 14 M. & W. 831; reversed, but not on this point, 4 Ex. 1.

(*c*) *Bateman v. Mid-Wales Rail. Co.*, L. R. 1 C. P. 499. Compare *Peruvian Rail. Co. v. Thames, &c., Ins. Co.*, 2 Ch. 617, where the power was held to be conferred by the general words of the articles of association.

(*d*) In *Jacobs v. Morris* [1901], 1 Ch. 261.

(*e*) *Ex parte Overend, Gurney, &*

Co., 4 Ch. 460; *Gordon v. Sea Fire and Life Assurance Co.*, 1 H. & N. 599; *Thompson v. The Wesleyan Newspaper Association*, 8 C. B. 849; *Allen v. Sea Fire and Life Assurance Co.*, 9 C. B. 574; *Forbes v. Marshall*, 11 Ex. 166; *MacLae v. Sutherland*, 3 E. & B. 1. See, also, the judgment of Holroyd, J., in 3 B. & A. 10, and compare *Stark v. Highgate Archway Co.*, 5 Taunt. 792. In *Aggs v. Nicholson*, 1 H. & N. 165; and *Lindus v. Melrose*, 2 ib. 293, and 3 ib. 177, the point decided was, that the defendants were not personally liable on the notes there in question. These cases by no means decided that the companies would have been liable without proof of authority in their directors to issue notes on their behalf. The marginal notes of the reporters go too far, and are apt to mislead. In *Halford v. Cameron's Coalbrooke, &c., Co.*, 16 Q. B. 442, and *Edwards v. Cameron's Coalbrooke, &c., Co.*, 6 Ex. 269, the action was against the company, but the authority of the directors to bind it by bills was not in issue.

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not having authority to accept or indorse bills or notes; if he has such authority, his abuse of it does not affect a *bonâ fide* holder for value without notice (*f*).

Before leaving the subject of negotiable instruments it may be observed that it is often difficult to say whether they purport to be the paper of a company or only that of some one or more of the directors. Unless the paper purports to be the paper of a company no one whose name is not on the paper is liable to be sued on it (*g*). This subject will be adverted to hereafter (*h*).

Bill in Parliament.

Bill in Parliament.—It will be seen hereafter that it is not competent for the directors of a company to employ its funds in endeavouring to obtain an Act of Parliament authorising it to engage in businesses for which it was not formed (*i*). And a contract by one railway company with another, to the effect that the first shall take a lease of the line of the second and pay the expenses of an application to Parliament for an Act extending and improving such line has been held illegal and void (*k*). But in a more recent case, it has been held that a railway company is liable to pay for surveys, plans, &c., made by order of its directors for the purpose of an application to Parliament for an extension of powers (*l*).

Bonds.
Lloyd's Bonds.

Bonds.—What are called *Lloyd's Bonds* are instruments under the seal of a company, containing an admission by the company of its indebtedness to a specified amount to the obligee, and a covenant to pay him such amount, with interest, on a future day. The validity of these instruments depends on the considerations for which they are given; they are *primâ facie* binding on the company as admissions of indebtedness; but when issued by railway companies for money

(*f*) *Bryant, Powis, &c., Ltd. v. Quebec Bank* [1893], A. C. 171. Compare *Jacobs v. Morris* [1901], 1 Ch. 261.

(*g*) Bills of Exchange Act, 1882, § 23.

(*h*) *Infra*, pp. 278 *et seq.*

(*i*) *Infra*, Bk. III., c. 1, § 3.

(*k*) *Eastern Anglian Rail. Co. v. Eastern Counties Rail. Co.*, 11 C. B.

775. See, also, *McGregor v. Dover and Deal Rail. Co.*, 18 Q. B. 618; *Maunsell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130; *Taylor v. Chichester and Midhurst Rail. Co.*, L. R. 2 Ex. 356, and 4 H. L. 628.

(*l*) *Bateman v. Mayor of Ashton-under-Lyme*, 3 H. & N. 323; *Bramwell, B.*, dissented.

borrowed after their statutory powers of borrowing have been exhausted, they are altogether invalid and valueless (*m*). Bk. II. Chap. 3.
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See further, *infra*, chapter 5 of this book.

Borrowing money.—See *infra*, chap. 5, §§ 1 and 2.

Borrowing.
money.
Cheques.

Cheques.—The bankers of a company which has no proper directors may, nevertheless, safely pay cheques drawn in its name by those persons who in fact carry on its business, unless the bankers are aware of their want of authority (*n*).

Overdrawing is borrowing; and bankers who allow companies which have no power to borrow to overdraw their accounts cannot recover the amount overdrawn from the company (*o*). Overdrawing.

Bankers who allow a company to overdraw its account have no remedy against the directors personally; although they may have signed the cheques or authorised others to sign them (*p*). But as regards building societies, the law is otherwise by virtue of 37 & 38 Vict. c. 42, § 43 (*q*).

Commencement of business.—The conditions which the Companies Act, 1900, requires to be fulfilled in those cases in which there is an invitation to the public to subscribe for shares before a company registered under the Companies Act after the 31st December, 1900, can commence business have been already discussed (*r*). Commencement
of business.

Compromises.—A company has, as incident to its existence, the same power as an individual to compromise claims brought against it (*s*). A power to compromise presupposes some dispute or difficulty (*t*). Compromises.

Debentures.—See *infra*, chap. 5, §§ 4 and 5.

Debentures.

(*m*) *Chambers v. Manchester, &c., Rail. Co.*, 5 B. & Sm. 588; *White v. Carmarthen Rail. Co.*, 1 Hem. & M. 786; *Cork and Youghal Rail. Co.*, 4 Ch. 748; *Fountaine v. Carmarthen Rail. Co.*, 5 Eq. 316-325.

7 H. L. 102.

(*n*) *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

(*q*) See *Cross v. Fisher* [1892], 1 Q. B. 467; *Looker v. Wrigley*, 9 Q. B. D. 397; *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696.

(*r*) *Ante*, pp. 209 and 230.

(*o*) *Infra*, p. 289. See *Cunliffe Brooks & Co. v. Blackburn Building Soc.*, 22 Ch. D. 61, and 9 App. Ca. 857, and *infra*, p. 295.

(*s*) *Bath's case*, 8 Ch. D. 334; *Dixon's case*, L. R. 5 H. L. 618; per Lord Westbury.

(*t*) *Mercantile Investment, &c., Trust Co. v. International Co. of Mexico* [1893], 1 Ch. 484, note.

(*p*) *Beattie v. Lord Ebury*, L. R.

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Deeds of com-
panies.

Deeds.—The deeds of unincorporated companies are governed by the principles applicable to ordinary partnerships (*u*).

The question, whether an instrument sealed with the seal of an incorporated company is binding on the company, depends (1) on the authority by which the seal was affixed to the instrument, and (2) on the nature of the instrument. An instrument to which the seal has been affixed by a person who has no authority to affix it, is invalid, and if there is any intent to defraud, is a forged instrument (*x*). On the other hand, an instrument sealed by the proper officers is, *primâ facie*, binding on the body corporate; and although the presence of the seal does not have the effect of binding the corporation with respect to matters which are *ultra vires*, it does throw upon the corporation the onus of proving the invalidity of the instrument, and precludes the corporation from taking advantage of the non-observance of preliminary formalities, if the person dealing with its managers had not notice of such non-observance (*y*).

Delivery.

The affixing of the seal to a deed of a corporation is tantamount to delivery, in the absence of any intention to the contrary (*z*).

By § 55 of the Companies Act, 1862, any company under the Act may empower any person to execute deeds on its behalf in any place not situate in the United Kingdom (*a*).

Extension of
business.

Extension of business.—It follows from the principles investigated in the last chapter that although the directors of a company may develop the business which it was formed to

(*u*) As to the inability of one partner to bind his firm by a deed, see Partn. p. 149.

(*x*) See *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389, and *per Lord Eldon in Mayor of Colchester v. Louthen*, 1 V. & B. 244; *Mayor of the Staple of England v. Bank of England*, 21 Q. B. D. 160; *Ex parte Hanly*, 41 Ch. D. 215.

(*y*) *Bateman v. The Mayor of Ashton*, 3 H. & N. 323; *The Australian, &c., Co. v. Mounsey*, 4 K. & J. 733; *The Royal British Bank*

v. Turquand, 5 E. & B. 248, and 6 ib. 327; *Agar v. The Athenæum Life Assurance Co.*, 3 C. B. N. S. 725; *Scott v. Colburn*, 26 Beav. 276, and see *ante*, pp. 218 *et seq.*

(*z*) Grant on Corporations, p. 63; Comyns' Digest, Fait, A. 3; *Dean and Chapter of Fernes*, Davis Rep. 44b; *Derby Canal Co. v. Wilmot*, 9 East, 359; *Gartside v. Silkstone, &c., Co.*, 21 Ch. D. p. 768; *Mowatt v. Castle Steel Co.*, 34 Ch. D. 58.

(*a*) See also the Companies' Seals Act, 1864, 27 & 28 Vict. c. 19.

transact, they have no power to change the character of such business, nor to enlarge it by embarking in any business not necessary to carry on the first in the usual way. This subject has been already alluded to (b), and will be more fully examined hereafter when considering the powers of majorities to bind minorities, and the cases in which injunctions have been granted against directors (c). It is sufficient here to state that in conformity with the principles above alluded to, a company formed for the purposes of life insurance has been held not bound by policies against maritime risks, though issued with the sanction of two general meetings (d); that it has been doubted whether a copper mining company could sue on a contract for the supply of iron by itself (e); that a canal company has been held unable to obtain by prescription any right to water except for the purposes of its canal (f).

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On the other hand, it is now settled that railway companies are bound by contracts to carry or send goods beyond the limits of their own lines (g); and a railway company can sue upon a contract between itself and others who undertake to carry passengers and goods from its terminus across the sea in steam vessels (h).

See further in connection with this subject *ante*, *Bill in Parliament*, and *infra*, under the heads *Leases* and *Transfer of business*.

The power of a company formed for lending money, acquiring property and carrying on any monetary operations, to join other persons in buying an estate and building upon it and to form another company in order to carry out the speculation was much discussed in *London Financial Assurance v. Kelk* (i); and it was held that such operations were within the power of the company; that any irregularities

Buying share
in another
business.

London Financial
Association v.
Kelk.

(b) See *ante*, pp. 214 *et seq.*

(c) See Bk. III., chap. 1, § 3, and chap. 9, § 4.

(d) *Burges and Stock's case*, 2 J. & H. 441.

(e) *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

(f) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8.

(g) *Wilby v. West Cornwall Rail.*

Co., 2 H. & N. 703, and the cases there cited; *Great Western Rail. Co. v. Blake*, 7 H. & N. 987.

(h) *South Wales Rail. Co. v. Redmond*, 10 C. B. N. S. 675. Compare *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(i) 26 Ch. D. 107. Referred to *infra*, Bk. III., c. 2.

Bk. II. Chap. 3. in the way in which the directors had acted had arisen from
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 been approved and sanctioned by the bulk of the shareholders.
 In this case, however, the company's memorandum of association was so wide in its terms as to warrant almost any kind of business which the directors might choose to engage in.

Indemnities by
 directors.

Indemnity.—A company is not bound by an indemnity given by its directors, unless their power to give it can be shown (*k*); but a general power of management is a sufficient authority, if giving an indemnity is fairly within the scope of the company's business (*l*). Nor is a company bound by a guarantee given for a fraudulent purpose, and which purpose is known to the person to whom the guarantee is given (*m*). An agreement by directors, that persons taking shares in a company shall be indemnified by the company against loss, does not bind the company (*n*); nor does an agreement that the company will indemnify outgoing shareholders against their liabilities (*o*). But directors who personally give such indemnities, are bound by them (*p*).

Where two companies have power to amalgamate, an agreement by one of them to indemnify the other against its liabilities is valid, and capable of being enforced (*q*). See further as to this subject *infra*, under the head *Purchases*.

Insurances.

Insurances.—A life insurance company is not bound by marine policies issued by its directors with the sanction of a general meeting of shareholders (*r*). Nor is a fire insurance

(*k*) *Era Assurance Co.*, W. N., 1866, 309; *Ridley v. Plymouth Grinding Co.*, 2 Ex. 711; *Kirk v. Bell*, 16 Q. B. 290; and see, as to guaranteeing profits to other companies, *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*l*) *Ex parte Booker*, 14 Ch. D. 317; *Small v. Smith*, 10 App. Ca. 119; and as to indemnity to directors, *Pyle Works* (No. 2) [1891], 1 Ch. 173.

(*m*) *British and American Tel. Co. v. Albion Bank*, L. R. 7 Ex. 119; *Gray v. Lewis*, 8 Eq. 526; reversed but not on this point, 8 Ch. 1049.

(*n*) See *Bunn's case*, 2 De G. F. & J. 275.

(*o*) See *Munt's case*, 22 Beav. 55, and others of that class, which will be noticed hereafter in Bk. III., ch. 5, § 1.

(*p*) See *Barker v. Allan*, 5 H. & N. 61; *Haddon v. Ayres*, 1 E. & E. 118. Compare *Ellis v. Colman*, 25 Beav. 662.

(*q*) *Anglo-Australian Ass. Co. v. British Prov. Society*, 3 Giff. 521; and on app. 4 De G. F. & J. 341.

(*r*) *Phœnix Life Assurance Co.*, 2 J. & H. 441.

company, which has power to issue marine policies limiting the liability of the company to its funds, bound by marine policies issued in a name which is not the name of the company, and containing no stipulation as to the limit of liability (s). Bk. II. Chap. 3.
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Investments and loans.—Notwithstanding 38 & 39 Vict. c. 60, a loan by a friendly society to a person who is not a member of the society on the security of his promissory note is not illegal but merely unauthorised, and the money lent can therefore be recovered (t). Investments
and loans.

A company which has power to invest its money on mortgage may do what is necessary to work out its rights as a mortgagee and what is essential for the maintenance of its security (u).

A building society has no power to invest on second mortgage unless the prior mortgage is in favour of the society, and the directors who authorise such an advance are jointly and severally liable for any loss thereby occasioned (x).

There is nothing in the Companies Acts or in the nature of a limited company registered under those Acts, to prohibit such a company from making an advance to a member or director on the security of his shares (y); a building society may not advance money on the security of its shares (z).

Judicial Proceedings.—The powers of directors and others to act for the company in legal proceedings will be noticed hereafter when treating of actions (Bk. II., c. 7, and Bk. III., c. 9) and winding up (Bk. IV., c. 1). Judicial pro-
ceedings.

(s) *Hambro' v. Hull and London Fire Ins. Co.*, 3 H. & N. 789.

(t) *In re Coltman*, 19 Ch. D. 64. The Act 38 & 39 Vict. c. 60 has been repealed by the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25; but it is apprehended the decision is equally applicable to the present Act.

(u) *Sheffield, &c., Building Society v. Aislewood*, 44 Ch. D. 412 (an advance on second mortgage). See, too, *Small v. Smith*, 10 App. Ca. 119; *Royal Bank of India's case*, L. R. 4 Ch. 252.

(x) Building Societies Act, 1894, 57 & 58 Vict. c. 47, § 13; and see *Portsea Island Bldg. Soc. v. Barclay* [1895], 2 Ch. 298.

(y) *National Bank of Wales, Ltd.* [1899], 2 Ch. pp. 675, 676; *General Exchange Bank*, L. R. 6 Ch. 818. See p. 821.

(z) *Davis v. Norton* [1900], 2 Ch. 819; *Cullerne v. London, &c., Building Soc.*, 25 Q. B. D. 485. As to mortgages by infant members of building societies, see *Thurston v. Nottinghamshire, &c., Bldg. Soc.* [1901], 1 Ch. 88.

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Leases.

Leases.—With respect to leases to and by companies, a company may take on lease a larger house and more land than it wants at the time, and may sublet what it does not actually require at the time (*a*). It has also been held that the directors of an hotel company might lease part of the hotel for the purposes of a government office (*b*); but in this case the circumstances were peculiar; the hotel was of an immense size and just finished; the letting was to be temporary; and the whole building could not have been advantageously opened as an hotel at once. It is settled that in the absence of express power so to do, one railway company cannot lease its line to another and exclude itself from using it (*c*). Where, however, the articles of association of a company authorised two-thirds of the shareholders to require the directors to do any act which the company itself could do, and two-thirds of the shareholders authorised and required the directors to lease the company's works for twenty-one years, and such lease was made accordingly, it was held to be valid and binding on the company and on dissentient members (*d*).

It has been decided that a railway company cannot make a valid lease of any part of its land, so as to prevent the company from retaking the land if and when possession of the land becomes necessary for the purposes of the company (*e*). But this doctrine is not to be extended to cases in which it is not clearly proved that the lease is inconsistent with the attainment by the company of the purposes for which it was created; thus it has been decided that a railway company may grant leases of arches under its lines (*f*), and a right of

(*a*) See *Horsey's claim*, 5 Eq. 562.

(*b*) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141, and 8 H. L. C. 712. See, also, *Forrest v. Manchester and Sheffield Rail. Co.*, 30 Beav. 40, and 7 Jur. N. S. 887, as to temporary use of property.

(*c*) See *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 562; *London and Brighton Rail. Co. v. London and S.-W. Rail. Co.*, 4 De G. & J. 362; *Shrewsbury and Birmingham Rail. Co. v. North-Western Rail. Co.*,

6 H. L. C. 113. See further, as to this much litigated case, 2 Mac. & G. 324; 3 ib. 70; 16 Beav. 441; 4 De G. M. & G. 115; 17 Q. B. 652.

(*d*) *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, 1 Eq. 318.

(*e*) *Mulliner v. Midland Rail. Co.*, 11 Ch. D. 611. *Qu.*, if this case did not go too far. See [1896] 2 Q. B. 439.

(*f*) *Foster v. London, Chatham, and Dover Ry.* [1895], 1 Q. B. 711, disapproving of *Norton v. L. and N.-W. Rail. Co.*, 9 Ch. D. 623.

way over its land (*g*), and that a canal company may dedicate Bk. II. Chap. 3.
a part of the towing path to the public as a highway (*h*). Sect. 1.

A manager or director of an incorporated company may not personally distrain for rent due to the company unless he is duly authorised to act as a bailiff (*i*).

Mortgages and Pledges, see *infra*, chap. 5, § 3.

Negotiable Securities, see *Bills of Exchange*, *ante*, p. 242, and *Debentures*, *infra*, pp. 300—302.

Notice.—From the principle that the individual shareholders, and even the individual directors of a company are not its agents (*k*), it follows that notice to one of them is not notice to the company (*l*); and a company is not deemed to have notice through a director of a fraud on or breach of duty to the company committed by that director (*m*); nor are two companies having some directors, or other officers, in common necessarily affected through them with notice of each other's affairs, for knowledge acquired by a person as the officer of one company will not be imputed to another company of which he is also an officer, unless he has a duty to communicate such knowledge to the company sought to be affected by the notice, and a duty imposed upon him by that company to receive the notice (*n*). Thus where two companies, A. and B., had in common two directors and a solicitor, and company A., in order to buy up its own shares, borrowed money of company B., and this circumstance was known to one of the two directors and to the solicitor, it was nevertheless held that company B. had no notice of the impropriety of the transaction (*o*). At the same time if, as sometimes happens, one

(*g*) *Re Gouty and Manchester, Sheffield, &c., Rail. Co.* [1896], 2 Q. B. 439.

(*h*) *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

(*i*) *Hogarth v. Jennings* [1892], 1 Q. B. 907, and Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, § 7.

(*k*) *Ante*, pp. 204 *et seq.*

(*l*) See *Powles v. Page*, 3 C. B. 16; *Re Carew's Estate Act* (No. 2), 31 Beav. 39; *Peruvian Rail. Co. v.*

Thames, &c., Insurance Co., 2 Ch. 617.

(*m*) *Hampshire Land Co.* [1896], 2 Ch. 743; *Oriental Commercial Bank*, 5 Ch. 358; *Re Carew's Estate Act* (No. 2), 31 Beav. 39.

(*n*) *Hampshire Land Co.* [1896], 2 Ch. 743; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392, p. 432; *Crédit Foncier, &c., Co.*, 7 Ch. 161; *Ebbw Vale Co.'s claim*, 8 Eq. 14; *Gale v. Lewis*, 9 Q. B. 730.

(*o*) *Crédit Foncier, &c., Co.*, 7 Ch. 161, and cases in note (*n*). See, also,

Bk. II. Chap. 3. director has authority to act for a company, his knowledge of matters within the scope of his authority affects the company; and it may be said generally that a company is affected by the knowledge acquired by its agents in the course of their duty (*p*), and as to matters to which it is their duty to attend, but not to other matters (*q*).

Although every person has notice of what he himself does, a company is not affected with notice of what is done by its officers when acting for themselves and not for the company (*r*), nor when acting in fraud of the company or beyond their powers (*s*).

Notice of trusts. A company which by statute (*t*) is not bound to regard trusts will not be liable for breach of a trust of which it only has notice; it must have such actual knowledge of the terms of the trust as to render a disregard of them improper. Thus a company which knew certain of its shares were held by executors on trust and had a copy of the testator's will in its possession, was held not liable for having registered a transfer of such shares by the executors to a person not entitled thereto under the will, for there was no proof that the company knew the terms of the trust, and as to the will, the company was only concerned with the legal title to the shares, and to see that the persons claiming to be entitled to them as executors were so entitled under the will (*u*).

Gray v. Lewis, 8 Ch. 1035, reversing S. C. 8 Eq. 526.

(*p*) *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424, and 11 App. Ca. 20, *sub nom. Société Gén., &c. v. Walker*, where the knowledge was acquired from casual talk at a funeral, and notice was not imputed to the company.

(*q*) *British and American Tel. Co. v. Albion Bank*, L. R. 7 Ex. 119; *Trumitt's case* [1894], 3 Ch. 272, notice through clerk in absence of secretary; *Baelden v. London, &c., Ass. Co.* [1892], 2 Q. B. 534, notice through agent. See, also, *Styles v. Cardiff Steamboat Co.*, 4 N. R. 483, Q. B.; a case as to notice of ferocity of a dog.

(*r*) See the cases in Bk. III., c. 2,

with reference to transactions between directors and the company, and cases on reputed ownership, *Ex parte Boulton*, 1 De G. & J. 163; *Brown v. Savage*, 4 Drew. 635; *Willes v. Greenhill*, 29 Beav. 376 and 387.

(*s*) See in addition to the cases in note (*m*), *Partn.* 139, and *Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111; *Williamson v. Barbour*, 9 Ch. D. 535; *Lacey v. Hill*, 4 Ch. D. 537, and *ante*, pp. 234 *et seq.*

(*t*) See Companies Act, 1862, § 30; this section does not apply to companies registered in Scotland. Companies Clauses Consolidation Act, 1845, § 20.

(*u*) *Simpson v. Molson's Bank* [1895], A. C. 270.

All communications and notices to a company registered under the Companies Acts may be addressed to its registered office (x). 11k. II. Chap. 3.
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Purchases.—Companies are clearly liable for goods supplied to them for the purpose of carrying on their business, if ordered by their agents. It has been held that the members of a cost-book mining company are liable for goods supplied to the mine by the order of its directors or resident manager (y); and that an ordinary joint-stock company cannot escape liability for goods *bonâ fide* supplied to it for the purposes of its business, and by the order of the superintendent of its works, simply because he may not have been appointed in strict conformity with the company's deed of settlement (z). So a company is liable to pay for goods which it has power to buy, and which have been ordered in its name by its agents, although not for its use (a). But the mere circumstance that goods have been supplied to a company in the course of its trade and have been used by it, is not sufficient to render the company liable for them if they were supplied by the order of persons not authorised to obtain them for the company (b). In such a case ratification by the company must be proved (c). A company has implied power to purchase a patent which is useful to it for the purpose of carrying on its business (d).

A purchase by a company, if it is an act of bankruptcy on the part of the seller, may be set aside even after the company has gone into liquidation (e).

Whether a company can buy shares in another company depends on the objects with which it is formed (f). If the company has no power to buy such shares it may perhaps accept them by way of compromise for a debt, if it does so

(x) Companies Act, 1862, § 39.
(y) *Newton v. Daly*, 1 Fos. & Fin. 26; *Tredwen v. Bourne*, 6 M. & W. 461; *Hawken v. Bourne*, 8 ib. 703. As to *Vice v. Anson*, 7 B. & C. 409, see the above cases, and *Owen v. Van Uster*, 10 C. B. 318.

(z) *Smith v. Hull Glass Co.*, 11 C. B. 897; *Allard v. Bourne*, 15 C. B. N. S. 468.

(a) *Ebbw Vale Co.'s claim*, 8 Eq. 14.

(b) *Kingsbridge Flour Mill Co. v. Plymouth Grinding Co.*, 2 Ex. 718.

(c) As to which, see *ante*, pp. 234 *et seq.*

(d) *Leifchild's case*, 1 Eq. 231.

(e) *Carl Hirth* [1899], 1 Q. B. 612, a case of a sale to a "one man" company, see *ante*, pp. 159-161.

(f) *Ante*, p. 60.

Bk. II. Chap. 3. without an intention of permanently holding them (*g*). But a
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company has no implied power to buy its own shares, nor is such a power included in a general power to deal in shares (*h*). In fact, such a power is inconsistent with the whole principle of limited companies, and cannot be conferred on such a company by its articles of association, nor, it is conceived, even by its memorandum of association (*i*); indeed a purchase by a company of its own shares amounts to a reduction of its capital (*k*), and can only be effected in the case of limited companies under the provisions of the Companies Acts which authorise such companies to reduce their capital (*l*).

Representations. *Representations.*—A joint stock company is not bound by the statements of one of its members, unless he is also the agent of the company, and his statements relate to matters within the scope of his agency (*m*), and are made by him when acting for the company in some business with a third party (*n*). Nor is a company bound by statements made by one of its directors, if he is not singly an agent of the company (*o*). But a company is bound by the statements of its directors, if made by them honestly for the company and in the course of the business which it is their duty to transact (*p*).

(*g*) *Lands Allotment Co.* [1894], 1 Ch. 616. As to advancing money on the security of its shares, see *ante*, p. 249.

(*h*) *Zulueta's claim*, 5 Ch. 444. For an instance of such a power being conferred by statute, see *Sovereign Life Ass. Co.* [1892], 3 Ch. 279.

(*i*) See *Trevor v. Whitworth*, 12 App. Ca. 409, where the earlier cases are collected and discussed. Lord Macnaghten (p. 436) was of opinion that the power, even if contained in the memorandum of association, would be void—and the writer is of the same opinion. See 41 Ch. D. pp. 23, 24. This point, however, did not actually arise, and has not been directly decided.

(*k*) See *Sovereign Life Ass. Co.* [1892], 3 Ch. 279.

(*l*) *British and American, &c., Corp. v. Couper* [1894], A. C. 399; *Dicido Pier Co.* [1891], 2 Ch. 354, where the articles made provision for the establishment of a sinking fund out of profits for the purpose of purchasing its preference shares. As to reduction of capital, see *infra*, Bk. III., c. 3, § 1.

(*m*) *George Whitechurch, Ltd. v. Cavanagh*, 17 Times L. R. 746; *Burnes v. Pennell*, 2 H. L. C. 497, *ante*, p. 204; *Burnett Hoares & Co. v. South London Tramways Co.*, 18 Q. B. D. 815.

(*n*) *Devala Provident Gold Mining Co.*, 22 Ch. D. 593.

(*o*) *Holl's case*, 22 Beav. 48; *Gibson's case*, 2 De G. & J. 275; *Nicol's case*, 3 De G. & J. 387.

(*p*) See the cases cited in § 3. *Meux's Ex. case*, 2 De G. M. & G. 522.

As regards representations respecting the credit of persons, these to be actionable must be in writing signed by the persons, making them (9 Geo. 4, c. 14, § 6). Signature by an agent is not enough, and a company whether incorporated (*pp*) or unincorporated (*q*) or governed by 7 Geo. 4, c. 46 (*qq*), is not liable to be sued for a misrepresentation of the kind in question made by its manager although signed by him.

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A certification on a transfer that the necessary documents have been lodged with the company is not a representation respecting credit within these statutes (*r*).

How far companies are liable for the false and fraudulent statements of their directors and other officers will be examined in a subsequent section of the present chapter.

See further on this subject *ante*, under the head *Admissions*.

Sales.—With respect to sales by companies, the main points to be borne in mind are :—

Sales by companies.

1. Corporations not created for any clearly limited purpose have by common law full power to sell their own corporate property (*s*).

2. Railway and other companies governed by special Acts of Parliament conferring upon them rights and privileges which they would not otherwise enjoy, cannot delegate or transfer those rights and privileges to other persons (*t*).

3. Although general powers of management necessarily include power to sell in the ordinary course of business, such powers do not authorise sales of an unusual description, *e.g.*, a sale of the business of the company (*u*).

(*pp*) *Hirst v. West Riding, &c., Co.* [1901], 2 K. B. 560.

Corporation of Avon, 29 Beav. 144, and *ante*, pp. 215 *et seq.*

(*q*) See the case in the last note and *Williams v. Mason*, 28 L. T. 232.

(*t*) See *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 562, and other cases of that class, *ante*, p. 250, note (*c*). And cases *infra*, pp. 334 and 336, as to the right of debenture holders to the appointment of a manager or to a sale in the case of such companies.

(*qq*) *Swift v. Jewsbury*, L. R. 9 Q. B. 301, overruling 8 Q. B. 244. Compare *Barwick v. English Joint Stock Bank*, 2 Ex. 259.

(*r*) *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512, p. 522, overruling *Vaughan-Williams, J.*, on this point, *ib.* p. 85. See as to the effect of such a certification, *ante*, p. 83.

(*u*) See *Ernest v. Nicholls*, 6 H. L. C. 401; *Ex parte Liquidators of the British Nation, &c., Ass.*, 8 Ch. D. 679, and the cases cited *ante*, p. 241, note (*h*). See, also, *Chapple v. Cadell*, Jac. 537, *infra*, note (*c*).

(*s*) *Mayor, &c., of Colchester v. Lowten*, 1 V. & B. 226; *Evan v.*

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company as a whole and selling all the existing goods and chattels of the company. This is well illustrated by the case of *Wilson v. Miers* (*x*). There a steamship company, being the reverse of prosperous, its directors entered into a contract for the sale of its whole fleet. The purchaser declined to complete the contract, on the ground that, although the directors had general powers of management, including power to buy and sell ships, they could not, in the absence of a resolution to dissolve the company, sell off all its ships at once. The Court of Common Pleas, however, held that the contract was one which the directors could lawfully enter into and carry out without any special authority from the shareholders.

Companies governed by the Companies Acts may sell the whole of their undertaking if authorised so to do by their memorandum of association (*y*), unless, indeed, their undertaking is governed by a statute which excludes such a power (*z*). They cannot, however, distribute the proceeds of sale amongst the shareholders without going into liquidation, or reducing their capital under the provisions of the Companies Acts. The position of debenture holders, who have a floating charge on the company's undertaking, will be examined hereafter (see *infra*, pp. 318—320).

Tramway companies have power to sell their undertaking with the sanction of the Board of Trade (*a*).

4. A power to sell the assets of a company as a whole when it is being wound up voluntarily is conferred by the Companies

(*x*) 10 C. B. N. S. 348.

(*y*) *Foster v. Borax Co.* [1901], 1 Ch. 326, disapproving *ib.* [1899], 2 Ch. 130; *Cotton v. Imperial, &c., Corp.* [1892], 3 Ch. 454; *New Zealand Gold, &c., Co. v. Peacock* [1894], 1 Q. B. 622, where the sale included proceeds of a call the company agreed to make. See, too, *Wall v. London, &c., Corp.* [1898], 2 Ch. 469, and *Metropolitan Bank, &c., v. H. Vivian & Co.* [1900], 2 Ch. 654, where the sales did not include the

whole of the assets.

(*z*) *Ante*, note (*t*).

(*a*) Tramways Act, 1870, 33 & 34 Vict. c. 70, § 44; and see *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 358. This does not enable debenture holders to sell or obtain an order for sale. *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36, disapproving *Hope v. Croydon, &c., Tram. Co.*, 34 Ch. D. 730, and *Bartlett v. West Metropolitan Co.* [1894], 2 Ch. 286, and *infra*, p. 336.

Act, 1862 (b) ; and independently of that Act, where there is power to wind up, there must necessarily be a power to sell and convert into money (c), unless such a sale is excluded by Act of Parliament (d). Bk. II. Chap. 3.
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See further *ante*, *Amalgamation*.

Transfer of business, see *ante*, *Amalgamation*, and *Sales*.

Transfer of
business.

SECTION II.—TORTS.

Although companies are seldom created to do what is wrong (*dd*), and can seldom be said to have in fact authorised the wrongful acts of their directors or servants, it is plain that the ordinary principles of agency apply to companies ; and on these principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment ; and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorise the very act complained of. All that is necessary to charge the company is that the act complained of should be *intra vires*, and not *ultra vires* (*e*), and should be committed for the company by its agent or servant in the course of the business to which it is his duty to attend, or as it is sometimes expressed, in the course and as part of his employment (*f*). Upon this principle it has been held that

(b) See § 161, and *infra*, Bk. IV. c. 2, § 2, and c. 3 ; and *Higgs' case*, 2 Hem. & M. 657 ; *Clinch v. Financial Corp.*, 5 Eq. 450, and 4 Ch. 117 ; *Imperial Bank of China, &c. v. Bank of Hindustan*, 6 Eq. 91 ; *City and County Investment Co.*, 13 Ch. D. 475 ; and *Union Bank of Kingston-upon-Hull*, ib. p. 808.

(c) See *Lord v. Copper Miners' Co.*, 2 Ph. 740. Compare *Chapple v. Cadell*, Jac. 537, where it was held that the majority of the proprietors of a newspaper could only sell their own shares.

(d) See *Barton-upon-Humber, &c., Water Co.*, 42 Ch. D. 585 ; *Borough of Portsmouth Tram. Co.* [1892], 2 Ch. 362.

(dd) In *La Société Anonyme, &c., Levassor v. Panhard Levassor, &c., Co.*

[1901], 2 Ch. 513, a company was formed for the fraudulent purpose of obtaining the benefit of another trader's reputation, and the directors of the company were held liable. See, too, *Thomas Edward Brinsmead & Sons* [1897], 1 Ch. 45 and 406, a somewhat similar case.

(e) See *ante*, p. 213, *et seq.*, and *Paulton v. L. & S.-W. Rail. Co.*, L. R. 2 Q. B. 534.

(f) See, on this subject generally, *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* [1901], A. C. 427, and the judgment of Farwell, J., pp. 430 and 433 ; *Burns v. Poulson*, L. R. 8 C. P. 563, and the cases cited *infra* ; with reference to arrests, *Lord Bolingbroke*

Bk. II. Chap. 3. the Bank of England is liable for a wrongful detention of bank notes by its servants (*g*); that a banking company is liable for the loss of securities entrusted to it and carelessly kept (*h*); that a company is liable for a wrongful seizure of goods made by its servants for non-payment of tolls (*i*); for wrongful assaults (*k*), and arrests if made by persons authorised to act for the company in removing persons or giving them into custody (*l*); for negligence in laying down gas-pipes (*m*); for reckless driving (*n*); for the infringement of a patent by its servants contrary to the orders of its directors (*o*); and for the publication of a libel by transmitting it by telegraph (*p*) or dictating it to a copying clerk (*q*). Moreover, in such cases as those now in question, it is not necessary, in order to fasten

v. Local Board of Swindon, L. R. 9 C. P. 575; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, ib. 1 Q. B. 711; and as to the non-liability of companies for the acts of directors and agents when not acting as their agents, *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714; *McGowan & Co. v. Dyer*, L. R. 8 Q. B. 141.

(*g*) *Yarborough v. Bank of England*, 16 East, 6. See, too, *Giles v. Taff Vale Rail. Co.*, 2 E. & B. 822.

(*h*) *Johnston's claim*, 6 Ch. 212. Compare *Giblin v. McMullen*, L. R. 2 P. C. 317.

(*i*) *Murind v. Monmouthshire Canal Co.*, 4 Man. & Gr. 452; *Smith v. Birmingham Gas Co.*, 1 A. & E. 526.

(*k*) *Butler v. Manchester and Sheffield Rail. Co.*, 21 Q. B. D. 207.

(*l*) *Moore v. Metropolitan Rail. Co.*, L. R. 8 Q. B. 36; *Bayley v. Manchester and Sheffield Rail. Co.*, L. R. 8 C. P. 148; *Goff v. G. Northern Rail. Co.*, 3 E. & E. 672. Compare *Edwards v. London and N.-W. Rail. Co.*, L. R. 5 C. P. 445; *Allen v. London and S.-W. Rail. Co.*, L. R. 6 Q. B. 65; *Poulton v. London and S.-W. Rail. Co.*, L. R. 2 Q. B. 534, and *Eastern Counties Rail. Co.*

v. Broom, 6 Ex. 314, in all of which the company was held not liable.

(*m*) *Scott v. Mayor of Manchester*, 1 H. & N. 59, and 2 ib. 204.

(*n*) *Green v. London General Omnibus Co.*, 7 C. B. N. S. 290; *Limpus v. Same*, 1 Hurlst. & C. 526.

(*o*) See *Betts v. De Vitre*, 3 Ch. 441.

(*p*) *Whitfield v. South-Eastern Rail. Co.*, E. B. & E. 115. See further, as to libels by companies, *Lawless v. Anglo-Egyptian, &c., Co.*, L. R. 4 Q. B. 262, where the libel complained of was contained in a report made by the directors to the shareholders, which was held to be a privileged communication.

(*q*) *Pullman v. Walter Hill & Co., Ltd.* [1891], 1 Q. B. 524. *Quere*: if the occasion is privileged and express malice has to be proved, *Nevill v. Fine Arts, &c., Co.* [1895], 2 Q. B. 173; the point was not mentioned by the Lords in their judgments [1897], A. C. 68. An action for damages will lie by an incorporated trading company in respect of a libel calculated to injure its reputation in the way of business, without proof of special damage, *South Hetton, &c., Co. v. North-Eastern News Ass.* [1894], 1 Q. B. 133.

liability on the company, to prove any formal appointment of the agent by the company (r). Bk. II. Chap. 3.
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Whether an action will lie against a corporate body for a malicious injury has been much discussed and doubted (s). The weight of authority is however in favour of such an action being maintainable, and in the author's opinion this is most in accordance with principle (t).

It is, however, essential in order that a company may be liable for the wrongful acts of its servants that those acts should be such as the company could have authorised, and that they should have been authorised or ratified by the company, or have been done by the servants in the course of their employment, and not when acting in matters to which it is not their duty to attend (u). Accordingly it was held that a company was not liable for injuries committed by a dog kept in a yard, there being no evidence to show that the savage nature of the dog was known to any one who had charge of it, nor to the company's manager, nor, in fact, to any one whose knowledge could be considered as the knowledge of the company, although it was proved to be known to one or two of its servants (x).

(r) See *Giles v. Taff Vale Rail. Co.*, 2 E. & B. 822.

(s) An action for malicious prosecution was held to lie in *Edwards v. Midland Rail. Co.*, 6 Q. B. D. 287, and *Cornford v. Carlton Bank, Ltd.* [1892], 1 Q. B. 393, affd. on merits [1900], 1 Q. B. 22, when it was conceded at the bar that the action would lie; and the possibility of its being sustainable was recognised by the Privy Council in *Bank of New South Wales v. Owen*, 4 App. Ca. 270. See, however, *contra*, *Stevens v. Midland Counties Rail. Co.*, 10 Ex. 352, and *Abrath v. N.-E. Rail. Co.*, 11 App. Ca. 247, where Lord Bramwell expressed a decided opinion against such an action. Criminal proceedings may be taken against a corporation for breach of a statute, *R. v. Tyler, &c., Co.* [1891], 2 Q. B. 588, and a corporation may be liable for issuing a false trade description, though in such cases an intent to

defraud is necessary, *Stacey v. Chilworth Gunpowder Co.*, 24 Q. B. D. 90, 50 & 51 Vict. c. 28, but a person in that Act expressly includes a corporation, see § 3 (1). A corporation, however, cannot be guilty of corrupt practices, *Mayor, &c., of Manchester v. Williams* [1891], 1 Q. B. 94, where an action for libel accusing a corporation of corrupt practices was dismissed on that ground. As to maintenance and champerty, see *Metropolitan Bank v. Pooley*, 10 App. Ca. 210.

(t) Pollock on Torts, 6th ed., pp. 58 and 92.

(u) See the cases in the last ten notes, and the judgment in *Bank of New South Wales v. Owen*, 4 App. Ca. 270. The cases cited in note (l) show that a company can ratify and adopt the torts of its agents, if those torts are such as can theoretically be imputed to the company.

(x) *Styles v. Cardiff Steam Boat Co.*, 4 N. R. 483, Q. B.

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The personal liability of directors and agents of companies for torts committed by them will be referred to hereafter. (See *infra*, p. 348 *et seq.*)

SECTION III.—FRAUDS.

Frauds of
directors.

It is now proposed to examine the general question—Under what circumstances is a fraud perpetrated by the directors of a company imputable to the company?

Directors of a company have no implied authority from the company to make false representations on its behalf; and, generally speaking, frauds committed by directors are quite as much frauds on the companies they represent as on other persons. But consistently with the established principles of agency, it does not follow that, as between an innocent company on the one hand, and an innocent individual defrauded by its directors on the other, the company is not responsible for the fraud committed by the directors. It has been held that the general interests of society demand that representations by the directors of a company may bind the company, although the shareholders may be ignorant of the representations and of their falsehood (*y*). In practice this question never arises in an abstract form, but always with reference to some remedy sought either by the company or against it; and if against it, then with reference to the rescission of some contract or with reference to an action for damages. This must always be borne in mind in reading the reported cases on the subject; for observations true with reference to one class of remedies may be inapplicable to another class (*z*).

1. Rescission
of contract.

First it will be convenient to refer to cases in which companies have sought redress, and to cases in which relief by way of rescission of contract has been sought against them.

National Ex-
change Company
of Glasgow *v.*
Drew.

In *The National Exchange Company of Glasgow v. Drew* (*a*),

(*y*) See p. 263, and the cases cited below.

(*z*) See in addition to the cases in the text, *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. App. 145; *Ranger v. The Great Western Rail. Co.*, 5 H. L. C. 72.

(*a*) 2 McQueen, 103. The judgments in this case were reviewed by Lord Chelmsford in *Nicol's case*, 3 De G. & J. 387, and were not altogether approved by him. See, however, the judgment of Lord Justice Turner in the same case.

the defendants had been induced, by the false statements contained in the reports of the directors to the shareholders of a company, and by the false representations of its manager, to borrow money of the company, and to buy shares in it with the money so borrowed, in order to keep the price of shares up in the market. The company sued for a return of the money lent, and the defendants relied upon fraud as an answer to the suit. The fraud was clearly proved, and it was held imputable to the company, and a sufficient ground of defence. The following passage from the judgment of the Lord Chancellor shows how the argument, that the fraud committed was not the fraud of the company, was met :—

“The company, as an abstract thing, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so), for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise companies of this sort would be in this extraordinary predicament—that they might employ, nay, must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might and must benefit by those misrepresentations, without being at all liable to be told, that is your fraud. It was plausibly argued that these reports were not made *by* the company but *to* the company. In form that is so. No doubt they are reports made to the company. But I assume, for the present, that they were made to the company under such circumstances that what they so report is known and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat that I think the exigencies of society demand that the reports so made and so circulated should be deemed to be the reports of the company.”

Lord St. Leonards expressed a similar view upon this question. He said, “If representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company; it is their own representation. What is the first act which takes place at any such meeting as that at which the report was read? The first act which takes place at every such meeting in Scotland and England is, that if there is not a rejection, there is an adoption of the report; then I say the report is the act of the company, and not simply of the directors. It does not stand as the simple

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Judgment of
Lord Cranworth.

Judgment of
Lord St. Leonards.

Bk. II. Chap. 3. statement of the directors. It becomes the act of the company by the adoption of the report, and sending it forth to the world as a true representation of their affairs, and if that representation is made use of in dealing with third persons for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those misrepresentations."

New Brunswick
Company v.
Conybeare.

Again, in *New Brunswick Co. v. Conybeare* (b), the facts of which will be referred to hereafter in considering the subject of the rescission of contracts for fraud, Lord Westbury said:—

Judgment of
Lord Westbury.

"I certainly am not at all disposed to advise your lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by the directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and those reports are afterwards industriously circulated (c), undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding the company. Neither do I think it would be at all expedient to question this conclusion—that if those reports, having been industriously circulated, shall be clearly shown to have been the proximate and immediate cause of shares having been bought from the company by any individuals, or subscribed for by any individuals, undoubtedly it will be impossible, consistently with the principles of equity, to permit the company to retain the benefit of that contract, and to keep the purchase money that has been so paid. There may be a very different consideration applied to the same transaction in a court of law and in a court of equity; because when an attempt is made in a court of law to render a party liable in damages for certain consequences of a misrepresentation, it is necessary to prove that the individual was aware, at the time, of the falsehood of the representation, or ought to have been so aware; but with regard to a claim for the restitution of property acquired through false representations made by an individual acting in the capacity of agent, although the company were no parties to those representations, and did not distinctly authorise them, it would still appear to be inconsistent with natural justice to permit property acquired by the company through the medium of those representations to be retained by them. So far, therefore, as these reports are concerned, they must be taken, I think, to be representations made by the company" (d).

Difference
between law
and equity.

Judgment of
Lord Cranworth.

Lord Cranworth expressed it as his opinion "That if an incorporated company, acting by an agent, induces a person to enter into a contract

(b) 9 H. L. C. 711.

(c) A report by the directors to the shareholders is not industriously circulated by being sent to absent shareholders, *Ex parte Barrett*, 2 Dr. & Sm. 415.

(d) See, in illustration of this doctrine, *Lovell v. Hicks*, 2 Y. & C. Ex. 46 and 481; *Slim v. Croucher*, 1

De G. F. & J. 518; *Smith v. Reese River Co.*, 2 Eq. 264; 2 Ch. 604, and L. R. 4 H. L. 64. When damages are sought, see *ante*, pp. 92 and 110, *et seq.*, and *Low v. Bouverie* [1891], 3 Ch. 82, in which the effect of *Derry v. Peek* on *Slim v. Croucher* and other cases was considered.

for the benefit of the company, that company can no more repudiate the fraudulent agent than an individual could repudiate him, and that consequently the company are bound by the misrepresentations of their agent : ” and after alluding to the opinion he had expressed in *The National Exchange Company v. Drew*, and which is given above, his lordship added—

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“ To that opinion I entirely adhere, and I think it would have been applicable in this case if it had been proved that there had been a fraudulent representation or concealment by the directors, in order to induce Mr. Conybeare to purchase, not shares in the market (that is a very different thing), but shares belonging to the company ; namely, forfeited shares. If the directors, or the secretary acting for them, had fraudulently represented something to him which was untrue, I then adhere to the opinion which I expressed in the former cases, that the company would have been bound by that fraud. But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person, not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorised him to be guilty of.”

The principles above laid down have indeed been questioned (c) ; but so long as it is law that a principal *may* be bound by the unauthorised act of his agent, so long it will be impossible to deny that companies *may* be affected by the false and fraudulent representations of their directors, although they have no authority to promulgate falsehoods. The falsehood may be an excess of authority, but it does not therefore follow that it is imputable only to those who utter it : and it is now settled that for all purposes of rescission of contract induced by a false and fraudulent statement made by an agent of a company, such statement is, in point of law, the statement of the company, if the statement relates to a matter as to which he is its agent (f), and if it is made in the course and as part of the business which he is appointed to transact for the company (g). Moreover in such cases there is no difference in principle between a fraudulent misstatement and a fraudulent concealment of a material fact (h).

Principles
applicable to
these cases.

(c) See *Nicol's case*, 3 De G. & J. 387 ; *Micer's case*, 4 ib. 575 ; *Ex parte Barrett*, 2 Dr. & Sm. 415.

(f) See the cases of rescission of contracts to take shares, *ante*, Bk. I.

c. 3, as well as the authorities referred to in the present section.

(g) As to this qualification, see the cases *infra*, pp. 264, 265.

(h) See *Peck v. Gurney*, 13 Eq. 79,

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Distinction between reports of directors and reports of shareholders.

A distinction is sometimes drawn between false reports made by directors to the shareholders, and adopted by them and then laid before the public, and false statements made by the directors alone to persons making enquiries of them with reference to the affairs of the company. But if such statements as the last cannot bind the company, it is difficult to see on what principle untrue reports adopted by shareholders can be regarded as emanating from those shareholders who do not expressly adopt them. If the directors are not the agents of the body of shareholders, for the purpose of stating what is false, surely some of the shareholders are not the agents of the rest for the same purpose. To say that a falsehood emanating from the directors is not imputable to the company, but that a falsehood emanating from a meeting of the shareholders is imputable to the company, cannot be right. The same principles ought to be applied to both cases; and the distinction between representations made by shareholders and similar representations made by directors is only sound when the representations relate to matters which the shareholders are competent to deal with, but the directors are not.

Reports and circulars when not imputable to company.

It must not be concluded from the foregoing observations that circulars and reports issued by a company are to be regarded as representations by the company to any one who sees them and is induced, even by an officer of the company, to act upon them. They will not amount to representations by the company unless they were issued for the purpose for which they are afterwards used; nor unless used by some person whose business it is to carry out that purpose; nor unless used by him when acting on behalf of the company. This is well illustrated by *Burnes v. Pennell* (i), which is sometimes, but erroneously, supposed to have decided that false reports made by the directors to their shareholders, and afterwards laid before the public, are not to be regarded as

Burnes v. Pennell.

and L. R. 6 H. L. 377; *Barrick v. English Jt. Stock Bank*, L. R. 2 Ex. 259; and *Oakes v. Turquand*, L. R. 2 H. L. 325.

(i) 2 H. L. C. 497. See, too,

Nicol's case, 3 De G. & J. 387; *Bigge's case*, 5 Jur. N. S. 7; *Worth's case*, 4 Drew, 529; and see *Peck v. Gurney*, L. R. 6 H. L. 377, which, however, was an action for damages.

representations by the company. In this case a company was paying dividends when it was not warranted in doing so; its directors had issued and published false reports as to the flourishing state of its affairs; some time after these reports had been published, and when in fact they were old, they were shown by the law agent of the company to a person who was desirous of taking shares in it, and who ultimately did take shares in it on the faith of the representations made to him by the law agent, backed by the reports in question. It was held that these circumstances afforded no answer to an action for calls. It was no part of the business of the law agent to induce people to take shares in the company; no part of his business to make any representations as to the affairs of the company. The case is an authority for the proposition that representations made by an unauthorised person, although an officer of the company, do not bind the company, and that reports of the company used by him to substantiate his statements are not to be regarded as representations made by the company to the person to whom he shows them. But the case is no authority for the proposition that reports of directors are not reports of the company upon whose affairs it is part of their business to report. Whether any person who sees them is entitled to make use of them against the company is quite a different matter. He is only entitled to do so in one of three cases, viz., 1, if the reports are published for the purpose of being acted upon by the public, and he as one of the public deals with the company upon the faith of them; or, 2, if, being used for the purposes for which they were published, they are so used by the agents of the company when acting within the limits of their real or apparent authority and on behalf of the company; or, 3, if being used for the purpose of inducing him to enter into a contract with the company, the company is affected with knowledge before the contract is complete either that it was induced by misrepresentation or that it was made on the basis of representations some of which were in fact material and untrue (*k*).

(*k*) See as to case 3, *Karberg's case* *Italian Hemp Spinning Co.* [1896], 1 [1892], 3 Ch. 1; *Lynde v. Anglo-* Ch. 178, cited *ante*, pp. 95, 96.

Bk. II. Chap. 3. Numerous other cases illustrating these principles will be
Sect. 3. found in the chapter relating to membership induced by false statements (Bk. I. c. 3, *ante*, p. 86 *et seq.*).

2. Actions for damages. Passing now to actions for damages, the question whether a corporate body can commit a fraud and be liable in damages for it, at once presents itself for consideration. Some eminent judges are of opinion that an action of deceit will not lie against a corporation (l); but the contrary has been decided more than once, both by the Privy Council and by the Exchequer Chamber.

Barwick v. English Joint Stock Bank. In *Barwick v. English Joint Stock Bank* (m), an incorporated banking company was held liable in damages for a false and fraudulent statement of its manager relating to the state of a customer's account with the bank.

Mackay v. Commercial Bank of New Brunswick. In *Mackay v. Commercial Bank of New Brunswick* (n) the above case was followed, and a banking corporation was again held liable in damages for a false and fraudulent statement of its manager, by which the plaintiff had been induced to accept a bill in which the bank was interested.

Swire v. Francis. In *Swire v. Francis* (o) these cases were again approved, but this was not an action against a company. *Swire v. Francis* is, however, another clear authority to the effect that principals are liable for the frauds of their agents on precisely the same grounds on which they are liable for other acts which are not in fact authorised: and this the writer conceives to be the true doctrine (p).

But assuming this to be the law it will be still true that a

(l) See Lord Bramwell's judgment in *Abrath v. N.-E. Rail. Co.*, 11 App. Ca. 352; and *per* Lords Chelmsford and Cranworth in *Addie v. Western Bank of Scotland*, L. R. 1 Sc. & Div. App., pp. 158, 166. See the comments on the dicta in this case in *Mackay v. Commercial Bank*, L. R. 5 P. C. 413; and *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Ca. 317.

(m) L. R. 2 Ex. 259, a case of fraudulent concealment. Compare *Swift v. Jewsbury*, L. R. 9 Q. B. 301,

which turned on the signature of the manager not being the signature of the bank, within 9 Geo. 4, c. 14, § 6. See *ante*, p. 255.

(n) L. R. 5 P. C. 394.

(o) 3 App. Ca. 106.

(p) See Bigelow's *Lead. Ca.* on the Law of Torts, p. 25, *et seq.*; Pollock on Torts, 6th ed. 299 *et seq.* In *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317, *ante*, p. 94, the liability of the company, but for the winding up, was not denied by the House of Lords.

company (like any other principal) is not liable in damages for a false and fraudulent representation of its agent unless such representation has been made for and on behalf of the company and in the course of the business which it is his duty to transact (q). *Burnes v. Pennell* (r), which has been already noticed, is an illustration of the application of this principle to reports made by directors to shareholders and shown to other persons by agents of the company, but by agents whose employment did not extend to circulating the reports.

So in *British Mutual Bank Co. v. Charnwood Forest Rail. Co.* (s), a company was held not liable for a false and fraudulent representation made by an agent for his own purposes and not in fact for or on behalf of the company; although the representation related to matters as to which it was his business to answer inquiries.

Bk. II. Chap. 3.
Sect. 3.
British Mutual Bank. Co. v. Charnwood Forest Rail Co.

Again, in *Barnett, Hoares & Co. v. South London Tram. Co.* (t), a company was held not liable in damages for a false and fraudulent representation made by its secretary, on the ground that it was not his duty to make representations on behalf of the company.

Barnett, Hoares & Co. v. South London Tram. Co.

In the two last cases the company derived no benefit from the misrepresentation. This circumstance was material on the question whether the agent was or was not acting for and on behalf of the company; but if he had been so acting within the scope of his employment, the fact that the company was not benefited would, it is apprehended, have been immaterial.

In *Barry v. Croskey* (u), it was attempted to make a company liable for alleged frauds on the part of the directors in getting up the company and issuing its shares, and in procuring the recognition of the company by the Stock Exchange

Frauds on Stock Exchange.
Barry v. Croskey.

(q) See *Thorne v. Heard* [1895], A.C. 495, affirming [1894], 1 Ch. 599.

(r) *Ante*, p. 264. See, also, *Peck v. Gurney*, L. R. 6 H. L. 377

(s) 18 Q. B. D. 714. Observe that the stock certificates in question were for stock which the company had no power to issue, being for stock in excess of the company's borrowing power; but the person deceived did

not know that the agent was not in fact acting for the company, and *qu.* whether sufficient weight was given to this circumstance. The principle of this case has been approved in *Thorne v. Heard*, *ubi supra*.

(t) 18 Q. B. D. 815. See, too, *George Whitechurch, Ltd. v. Cavanagh*, 17 Times, L. R. 746.

(u) 2 J. & H. 1.

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Sect. 3.

3. Committee, and the appointment of a settling day for its shares. The bill charged that the company had adopted and ratified the acts of the directors, and that by the frauds in question the shares of the company had commanded in the market prices considerably higher than would otherwise have been possible. The bill then stated various dealings and transactions in shares of the company between the plaintiff and the broker of one of the directors, and that by these dealings and transactions, which were in fact time bargains, the plaintiff had lost money in consequence of the frauds of which he complained. The plaintiff by his bill sought to have all the contracts into which he had entered with the directors cancelled, and to be repaid all the moneys paid by him under those contracts. To this bill the company demurred; and the demurrer was allowed on the ground that the frauds complained of were, according to the plaintiff's own statements, such as could not be attributed to the company, but only to the individuals who were concerned in their perpetration. The company had done nothing in order to induce the plaintiff or any one else to speculate in its shares; the company knew nothing of the plaintiff nor of his dealings, and had not in any way been benefited thereby; the damage moreover sustained by the plaintiff was too remote to be attributed to anything imputable to the company. The Vice-Chancellor observed that "if this were the case not of a company and its directors, but of an individual principal and of his agent, the principal could never be held responsible in the manner for which the plaintiff contends."

Companies Act,
1867, § 38.

For reasons which have been already explained (Bk. I. c. 3, § 1), a company is not, apart from statute (*r*), liable in damages for false as distinguished from fraudulent statements of its directors or agents; nor was a company responsible in damages for those acts which can only be regarded as fraudulent by reason of § 38 of the Companies Act, 1867 (*x*).

The personal liability of directors and others for frauds committed by themselves has been already examined. See Bk. I. c. 3, §§ 1 and 2, and see *infra*, p. 348 *et seq.*

(*r*) See *ante*, p. 118, note (z).

(*x*) *Ante*, pp. 128-130.

CHAPTER IV.

OF THE PROPER FORM OF CONTRACTS WITH COMPANIES AND OF
THE EFFECT OF FORM ON LIABILITY.SECTION I.—OF THE RULE REQUIRING CONTRACTS OF CORPORATION
TO BE UNDER SEAL.

It is a rule of the common law that, subject to one or two exceptions which will be noticed presently, a body corporate is not bound by any contract which is not under its corporate seal; and this rule has always been rigidly adhered to both at law and in equity (a).

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Sect. 1.

Contracts of
corporations.

(a) See generally, on this subject, Com. Dig. Franchise, F. 13; Bac. Ab. Corporation; Vin. Ab. Corporation; Grant on Corporations; Pollock on Contracts, 6th ed., p. 142, *et seq.*; *R. v. Bigg*, 3 P. W. 419; *Broughton v. The Manchester and Salford Waterworks Co.*, 3 B. & A. 1; and on the application of the rule in equity as well as at law, see *Winne v. Bampton*, 3 Atk. 473; *Taylor v. Dulwich Hospital*, 1 P. W. 655; *Wilmot v. Corporation of Coventry*, 1 Y. & C. Ex. 518; *Carter v. Dean of Ely*, 7 Sim. 211; *Gooday v. The Colchester Rail. Co.*, 17 Beav. 132; *Preston v. The Liverpool, &c., Rail. Co.*, *ib.* 114, and 5 H. L. C. 605. An action will in some cases lie against a corporation for money had and received, *Hall v. The Mayor of Swansea*, 5 Q. B. 548; for money paid, *Jefferys v. Gurr*, 2 B. & Ad. 833; for use and occupation, *Lowe v. The London and North-West. Rail. Co.*, 18 Q. B. 632; and see *Eccl. Comrs. v. Merril*, L. R. 4 Ex.

162; but see *Finlay v. The Bristol Rail. Co.*, 7 Ex. 409. As to actions by corporations on contracts not under seal, see *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 *ib.* 617, overruling *East London Waterworks Co. v. Builey*, 4 Bing. 283. See, also, *McArdle v. Irish Iodine Co.*, 15 Ir. Com. Law Rep. 146; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Fishmongers' Co. v. Robertson*, 5 Man. & Gr. 131; *Mayor of Stafford v. Till*, 4 Bing. 75; *Doe v. Taniere*, 12 Q. B. 998; *The London Dock Co. v. Sinnott*, 8 E. & B. 347; *Doe v. Bold*, 11 Q. B. 127. See as to the engagement of a clerk to a workhouse, *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91; and as to the appointment and retainer of a solicitor by an incorporated company, *Thames Haven Dock Co. v. Hall*, 5 Man. & Gr. 274; *Faviell v. The Eastern Counties Rail. Co.*, 2 Ex. 344; *R. v. Cumberland*, 5 Ra. Ca. 332, which show that the solicitor on the record will be presumed

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At common law any seal affixed by the proper authority will suffice (b); but any director or other agent of a limited company under the Companies Act, 1862, who uses a seal without the company's name engraved upon it makes himself liable to a penalty of 50*l*. (See sects. 41 and 42 of that Act.) There is a similar provision in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39, § 66).

Even a resolution of the members of the body corporate is not equivalent to an instrument under its seal (c); and a corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it (d). A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party (e).

to be properly appointed. If a solicitor sues a company for payment for his services, it is doubtful whether he must not prove a retainer under seal. See *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860, and compare *Haigh v. North Bierley Union*, E. B. & E. 873.

(b) Grant on Corp. 59. See as to the proper mode of affixing the seal and as to estoppels by instruments under seal improperly affixed, *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

(c) *Gibson v. The East India Company*, 5 Bing. N. C. 262; *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Smart v. West Ham Union*, 10 Ex. 867; *R. v. The Mayor of Stamford*, 6 Q. B. 433; *Cope v. The Thames Haven Co.*, 3 Ex. 841; *Dunstan v. The Imperial Gas Co.*, 3 B. & Ad. 125.

(d) *Wilmot v. The Corporation of Coventry*, 1 Y. & C. Ex. 518; *Taylor*

v. Dulwich Hospital, 1 P. W. 655; *Carter v. Dean of Ely*, 7 Sim. 211.

(e) *Mayor, &c., of Oxford v. Crow* [1893], 3 Ch. 535; *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *R. v. Stamford*, 6 Q. B. 433; *Paine v. The Strand Union*, 8 Q. B. 326; *Lamprell v. The Billericay Union*, 3 Ex. 283; *Diggle v. The London and Blackwall Rail. Co.*, 5 Ex. 442; *Homersham v. The Wolverhampton Waterworks Co.*, 6 Ex. 137; *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860; *Cope v. The Thames Haven Co.*, 3 Ex. 841. Courts of equity did not interfere in these cases. See *Crompton v. Varna Rail. Co.*, 7 Ch. 562; *Kirk v. The Bromley Union*, 2 Ph. 640; *Ambrose v. The Dunmow Union*, 9 Beav. 508; *Jackson v. The North Wales Rail. Co.*, 13 Jur. 69; *The Directors of the Midland Great West. Rail. of Ireland v. Johnson*, 6 H. L. C. 798. As to the effect of affixing the company's seal after the contract has been partly

But strict as is the rule in question, it is and always has been subject to qualification. There are, it is said, some matters of so trivial a nature that they can be done so as to bind a corporation in the absence of any instrument under its seal (*f*); and what is more to the present purpose, it is held that if a corporation is created for a particular purpose, it will be bound by unsealed contracts *bonâ fide* entered into on its behalf in the course of its ordinary business (*g*). Upon this principle the East India Company was held liable to be sued upon bills of exchange accepted on its behalf, although its seal was not upon them (*h*). So gas companies have been held bound by agreements, not under seal, for the supply of gas (*i*) and gas meters (*k*); a navigation company has been held bound by a contract, not under seal, for the navigation of its ships (*l*); a railway company has been held bound to pay for rails, oil, and paint, &c., supplied to it on the order of its officers (*m*); a colliery company for pumping machinery supplied for the purposes of its colliery (*n*); a poor law union for coals supplied on similar orders (*o*); and a municipal corporation owning a dock for refusing to admit a ship which they had agreed to admit in its turn (*p*). On the other hand it was held, in a well-considered case, that a dock company was not bound by an unsealed agreement for cleansing

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Exceptions to
the general
rule.

performed, see *Melliss v. Shirley Local Board*, 14 Q. B. D. 911, reversed on another point, 16 Q. B. D. 446.

(*f*) See as to this, *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617; and *Eaton v. Basker*, 7 Q. B. D. at p. 532.

(*g*) See as to the last condition, *Ebbw Vale Co.'s claim*, 8 Eq. 14, which, properly understood, is not inconsistent with the text.

(*h*) *Edie v. The East India Co.*, 2 Burr. 1216, and *Murray v. The East India Co.*, 5 B. & A. 204.

(*i*) *Church v. The Imperial Gas Light Co.*, 6 A. & E. 846.

(*k*) *Beverley v. The Lincoln Gas Co.*, 6 A. & E. 829. The judgment in

this case deserves more attention than it has received.

(*l*) *Henderson v. The Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409.

(*m*) *Ebbw Vale Co.'s claim*, 8 Eq. 14; *Denton v. East Anglian Rail. Co.*, 3 Car. & Kir. 16. Compare *Copper Miners' Co. v. Fox*, 16 Q. B. 229, where the corporation was held not liable for iron rails.

(*n*) *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617.

(*o*) *Nicholson v. Bradford Union*, L. R. 1 Q. B. 620.

(*p*) *Wells v. The Mayor of Hull*, L. R. 10 C. P. 402.

Bk. II. Chap. 4. its docks (*g*); and still more recently that poor law guardians are not bound by an unsealed agreement engaging a clerk (*r*). The exception in question, therefore, must still be applied with caution (*s*).

Part performance.

Another qualification of the general rule is founded upon the equitable doctrine of part performance. If a corporation has entered into an unsealed agreement which has been partly performed, and if the nature of the agreement and other circumstances are such as would induce a Court to decree specific performance of the contract if the parties to it were ordinary individuals, the Court will hold the corporation bound by the agreement, and will enforce it accordingly against or in favour of the corporation as the case may require (*t*).

Ratification.

A corporation may obviously ratify, under seal, a contract previously entered into but not under seal (*u*); but whether any other ratification of a contract required to be under seal will bind the corporation is questionable (*x*). It has, indeed,

Estoppel by record.

(*g*) *London Dock Co. v. Sinnott*, 8 E. & B. 347. But see on this case *South of Ireland Coll. Co. v. Waddle*, *ubi sup.*

(*r*) *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91. Compare *Scott v. Clifton School Board*, 14 Q. B. D. 500.

(*s*) These exceptions do not apply to non-trading corporations, the contracts of which are required by special statutes to be under seal. See the following cases under the Public Health Act, 1875 (38 & 39 Vict. c. 55, §§ 173 & 174): *Young & Co. v. Mayor of Leamington Spa*, 8 Q. B. D. 579, 8 App. Ca. 517; *Eaton v. Basker*, 6 Q. B. D. 201, reversed 7 Q. B. D. 529, on the ground that the Act did not require the contract in question to be under seal; *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, 4 C. P. D. 48.

(*t*) See *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. pp. 162, 163; *Melbourne Banking*

Corporation v. Brougham, 4 App. Ca. 156, at p. 168; *Crook v. Seaford*, 10 Eq. 678, and 6 Ch. 551; *London and Birmingham Rail Co. v. Winter*, Cr. & Ph. 57; *Earl of Lindsey v. Great Northern Rail. Co.*, 10 Ha. 664; *Laird v. Birkenhead Rail. Co.*, Johns. 500; *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, and 2 De G. J. & Sm. 475; *Marshall v. Corporation of Queenborough*, 1 Sim. & Stu. 520; *Maxwell v. Dulwich College*, 7 Sim. 222, note; *Stevens' Hospital v. Dyas*, 15 Ir. Ch. 405. In *Crampton v. Varna Rail. Co.*, 7 Ch. 562, the contract was not one which could be specifically enforced, and in *Leominster Canal Co. v. Shrewsbury and Hereford Rail. Co.*, 3 K. & J. 654, there was nothing amounting to part performance in the sense in which that expression is used in equity.

(*u*) See *ante*, Bk. II. c. 2, § 4.

(*x*) See the observations of Lord Blackburn, L. R. 9 Ex. 261.

been said, that a corporation which sues upon an unsealed contract thereby irrevocably ratifies it by matter of record; and that the invalidity of the contract sued upon cannot avail as a defence to the action; and further, that if the corporation is afterwards sued upon the same contract, it would be estopped from denying its validity (y). These propositions have, however, been denied by high authority and cannot be relied upon (z).

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If, however, a corporation is sued upon an unsealed agreement and judgment is obtained against it, the corporation will not be allowed afterwards to repudiate the agreement, as against the person who has obtained the judgment, unless the judgment can be shown to have been obtained by fraud; or unless the agreement itself can be impeached for fraud and the question of fraud was not in issue in the action in which judgment was obtained (a).

Effect of a
judgment.

Before leaving the present subject, it may be observed that although an instrument sealed with the corporate seal is *prima facie* valid, yet if the seal is essential to its validity, and if it be proved that the seal was improperly affixed, *e.g.*, was affixed by a person having no authority to use it, the instrument is void as a corporate act (b). But those persons who in practice conduct a company's business, have implied authority to use its seal for the purposes of such business (c); and a corporation will be estopped from disputing the authority to fix the seal if negligence imputable to the corporation has

Seal improperly
affixed.

(y) *Fishmongers' Co. v. Robertson*, 5 Man. & Gr. 192.

(z) *Mayor of Kidderminster v. Hardwicke*, L. R. 9 Ex. 13; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

(a) See *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547; *Hulett's case*, 2 J. & H. 306. In *The Athenæum Life Assur. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294, debentures were set aside, although in *Agar v. Athenæum, &c., Co.*, 3 C. B. N. S. 725, judgment had been obtained on another of like nature. But in the latter case the only plea was *non est factum*, and no question of fraud, even if

there were any in that case, was raised. As to what fraud will avoid a deed at law, see *Wright v. Campbell*, 2 Fos. & Fin. 393.

(b) See *Mayor, &c., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160; *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C. 389; *Ex parte Hanly*, 41 Ch. D. 215; *Colchester v. Louthen*, 1 V. & B. 243, 244; *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158. Compare *Ex parte The Contract Corporation*, 3 Ch. 105.

(c) See *Ex parte Contract Corp.*, 3 Ch. 105.

Bk. II. Chap. 4. conduced to the misuse of the seal and is the proximate cause
Sect. 1. ----- of the loss (d).

SECTION II.—STATUTORY EXCEPTIONS TO THE FOREGOING RULE.

Contracts of
companies.

The general rule, that a corporation is not bound by any contract not under its common seal, applies to all incorporated companies, save where it has been abrogated by statute; whence it follows, that in order that an incorporated company may be bound by a contract entered into on its behalf, the contract must fall within one of the exceptions already referred to, or be under the common seal of the company, or be entered into in the manner and form directed by the statute which empowers the company to contract in some other mode (e).

It is important, therefore, to ascertain what statutory enactments there are bearing upon this subject.

Statutory
enactments.

The Banking Act, 7 Geo. 4, c. 46, and the Letters Patent Act, 7 Will. 4 & 1 Vict. c. 78, leave the common law untouched as regards the question now under consideration. But companies regulated by these Acts are not incorporated by them.

The Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, §§ 44—46; the Joint-stock Companies Banking Act, 7 & 8 Vict. c. 113, § 22; and the Joint-stock Companies Act of 1856, § 41, all contained provisions on this subject; but these Acts are now repealed, and it is not necessary further to allude to them (f).

(d) See the first two cases in note (b), and *Bank of England v. Vagliano* [1891], A. C. p. 115, 136, 171.

(e) *Homersham v. The Wolverhampton Waterworks Co.*, 6 Ex. 137; *Diggle v. The London and Blackwall Rail. Co.*, 5 Ex. 442; *Cope v. The Thames Haven Co.*, 3 Ex. 841; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; and see *Ernest v. Nicholls*, 6 H. L. C. 401.

(f) Upon 7 & 8 Vict. c. 110, § 45, relating to bills and notes, see *Halford v. Cameron's Coalbrook Co.*, 16 Q. B. 442; *Edwards v. Cameron's*

Coalbrook Co., 6 Ex. 269; *Aggs v. Nicholson*, 1 H. & N. 165; *Healey v. Story*, 3 Ex. 3; *Allen v. The Sea, Fire, and Life Insurance Co.*, 9 C. B. 574; *Gordon v. The Sea, Fire, and Life Insurance Co.*, 1 H. & N. 599. As to § 44, relating to other contracts, see *Ridley v. The Plymouth Grinding Co.*, 2 Ex. 711; *Ex parte Eagle Insur. Co.*, 4 K. & J. 549; *Hambro v. Hull and London Fire Insur. Co.*, 3 H. & N. 789; *British Empire Co. v. Browne*, 12 C. B. 723. As to § 29, relating to contracts with directors, see *Stear's case*,

(1) By the Metropolis Gas Act, 1860 (*g*), the contracts of gas companies regulated by that Act and entered into in accordance with it are binding without any seal, if signed by two or more directors, or by the company's secretary, or other officer, by the authority of two or more directors.

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Sect. 2.

(1) Metropolis
Gas Act.

(2) The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, renders it lawful for the directors of a company to which that Act applies to appoint committees (§ 95), and enacts (§ 97) that the power of the committees as well as the power of the directors to make contracts on behalf of the company may lawfully be exercised as follows:—

(2) 8 & 9 Vict.
c. 16.

“With respect to any contract, which if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same.

“With respect to any contract, which if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same.

“With respect to any contract which, if made between private parties, would by law be valid though made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same.”

This enactment does not render a company liable on a contract entered into by its directors in writing, but not purporting to bind the company (*h*); nor on a contract required to be under seal or signed by two directors, but which is neither under seal nor so signed, although the company may have had the benefit of the contract (*i*). Moreover, notwithstanding the

Cases on this
Act.

Johns. 480; *Ernest v. Nicholls*, 6 H. L. C. 401; *Curteis v. Anchor Insur. Co.*, 2 H. & N. 537; *Poole v. National Provincial, &c., Assurance Society*, ib. 687; *Murray's Ex. ca.*, 5 De G. M. & G. 746; *Teversham v. Cameron's Coalbrook, &c., Rail. Co.*, 3 De G. & S. 296; *Baker's case*, 1 Dr. & Sm. 55.

(*g*) 23 & 24 Vict. c. 125, § 20. Quære what the words “entered

into in accordance with this Act” really mean.

(*h*) See *Serrell v. The Derbyshire, &c., Rail. Co.*, 9 C. B. 821; and *McCollin v. Gilpin*, 5 Q. B. D. 390, affirmed 6 Q. B. D. 516, the case of a company governed by the Companies Act, 1862.

(*i*) *Leominster Canal Co. v. The Shrewsbury and Hereford Rail. Co.*, 3 K. & J. 654. See, too, *Diggle v.*

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Sect. 2. —

general words of the last clause of the enactment, it has been decided that where a company has entered into a contract in proper form for the execution of certain specified works, it is not bound to pay for extra works not done under the contract, although they may have been done by the orders and under the superintendence of the officer appointed by the directors to see the specified works properly executed (k). At the same time, where the company has had the benefit of a contract which if entered into between ordinary individuals would be valid, although not in writing, it will be presumed, in the absence of evidence to the contrary, that such contract was duly made by the directors of the company or a committee of them, or by an agent duly appointed, so as to be binding on the company. Upon this principle a railway company has been held liable to pay for the use and occupation of land occupied by it for the purposes of its business (l); and to pay for sleepers furnished to the company at the request of its engineer (m); although there was nothing in either case to show that any express written or parol contract had been entered into on behalf of the company by its directors or any committee of them.

The Statute of
Frauds and the
Companies
Clauses Act.

Ordinary individuals can appoint agents verbally, and the 4th section of the Statute of Frauds (n), and the 4th section of the Sale of Goods Act, 1893, which in certain cases require contracts to be evidenced by some writing signed by the party to be charged, or his agent, do not render it necessary that the agent there spoken of should be appointed in writing (o).

London and Blackwall Rail. Co., 5 Ex. 442; *Midland Great Western Rail. Co. of Ireland v. Johnson*, 6 H. L. C. 798. But see as to cases of part performance, *ante*, p. 272.

(k) *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137. See further, as to extra works, *Ranger v. The Great Western Rail. Co.*, 5 H. L. C. 72; and *Nixon v. The Taff Vale Rail. Co.*, 7 Ha. 136; *Kirk v. The Bromley Union*, 2 Ph. 640; *Lamprell v. The Billericay Union*, 3 Ex. 283.

(l) *Lowe v. The London and North-*

Western Rail. Co., 18 Q. B. 632. See *Finlay v. The Bristol and Exeter Rail. Co.*, 7 Ex. 409.

(m) *Pauling v. The London and North-Western Rail. Co.*, 8 Ex. 867. See further on this subject, *ante*, p. 271.

(n) § 17 has been repealed by the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, and replaced by § 4 of that Act. See, too, § 3.

(o) *Coles v. Trecothick*, 9 Ves. 250; *Clinan v. Cooke*, 1 Sch. & Lef. 31. *Maclean v. Dunn*, 4 Bing. 722, shows

Hence a written contract entered into on behalf of a railway company for the purchase of land, and signed by its agent, is apparently binding on the company, although the agent may not have been appointed under seal or by any writing signed by two directors or members of a committee (p). Bk. II. Chap. 4.
Sect. 2.

It is beyond the scope of the present work to treat of the method in which companies governed by special Acts of Parliament and the Lands Clauses Act can obtain land for the purchase of their undertakings; but it is not altogether irrelevant to observe that where parties have agreed to refer questions of disputed compensation under that Act to arbitration, the appointment of an arbitrator on the part of the company may be made by the secretary (q). The Lands
Clauses Act.

(3) The Companies Act of 1856 contained a clause (r) similar to that which occurs in the Companies Clauses Consolidation Act (s); and although the Act of 1856 is repealed, it has been decided that companies formed and registered under it may still be bound by unsealed contracts (t). The Companies Act, 1862, contained no similar clause: but this defect has been cured by the Companies Act, 1867 (u). Under it a memorandum signed by a director (x) or authorised agent (y) is sufficient to bind the company so far as the Statute of Frauds is concerned. (3) The Compa-
nies Act, 1856.

The Companies
Acts, 1862 and
1867.

The Act also provides for the appointment by a company under its common seal, of agents to execute deeds abroad, and renders deeds executed by them as valid as if sealed by the Deeds executed
abroad.

that a verbal ratification of a previously unauthorised agreement signed by an agent renders the agreement binding on the principal.

(p) See the cases in note (x). See also *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, and 2 De G. J. & Sm. 475, where, however, this point was not alluded to.

(q) *Collins v. South Staffordshire Rail. Co.*, 7 Ex. 5.

(r) 19 & 20 Vict. c. 47, § 41.

(s) *Ante*, p. 275.

(t) *Prince v. Prince*, 1 Eq. 490.

(u) 30 & 31 Vict. c. 131, § 37,

which is printed in the Appendix. See, as to the Act of 1862, *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617, and *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674.

(x) *Jones v. Victoria Graving Dock*, 2 Q. B. D. 314. See also *Beer v. London and Paris Hotel Co.*, 20 Eq. 412.

(y) *John Griffiths Cycle Corp. v. Humber & Co., Ltd.* [1899], 2 Q. B. 414, explaining *Smith v. Webster*, 3 Ch. D. 49.

Bk. II. Chap. 4.
Sect. 2.

Companies Seals
Act, 1864.

company (*z*). This provision has been extended by a subsequent Act of Parliament (*a*), which authorises companies governed by the Companies Act, 1862, and carrying on business in foreign countries, to keep duplicate common seals there, having engraved upon them the name of the place in which they are to be used. The Act, however, only applies to companies expressly authorised by their articles of association, or a special resolution to exercise the powers given by the Act; and the persons entrusted with the seals must be specially empowered to use them by some instrument in writing under the common seal of the company. Instruments sealed by such persons in the place to which the seal entrusted to them applies, are as binding on the company as if such instruments had been sealed in this country with the ordinary common seal.

(4) Industrial
and Provident
Societies Act.

(4) The Industrial and Provident Societies Act, 1893 (*b*), contains a clause of a similar character to that in the Companies Act, 1867.

SECTION III.—OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

Bills of
Exchange Act,
1882.

By the Bills of Exchange Act, 1882 (*c*), a bill of exchange may be made payable to the holder of an office for the time being. The older cases therefore to the effect that a bill payable to the secretary or treasurer for the time being of a company, is invalid (*d*), are no longer law.

In general the persons liable to be sued on a bill of exchange as drawer, indorser, or acceptor, are the persons who have signed it as such and no others (*e*); but this rule does not affect the provisions of the Companies Act, 1862, nor the Industrial and Provident Societies Act, 1893 (*f*), nor any Act relating to joint-stock banks or companies, or the Bank of England or Bank of Ireland (*g*).

(*z*) § 55.

(*a*) 27 & 28 Vict. c. 19, printed in the Appendix.

(*b*) 56 & 57 Vict. c. 39, § 35.

(*c*) 45 & 46 Vict. c. 61, § 7 (2), and see as to promissory notes, § 89 (1).

(*d*) *Yates v. Nash*, 8 C. B. N. S.

581; *Storm v. Sterling*, 3 E. & B. 832, and *Cowie v. Sterling*, 6 E. & B. 333.

(*e*) 45 & 46 Vict. c. 61, § 23, and see § 89, as to promissory notes.

(*f*) 56 & 57 Vict. c. 39, §§ 33 and 66.

(*g*) 45 & 46 Vict. c. 61, § 97 (3).

The power of a corporation to bind itself by drawing, accepting, or endorsing a bill is left by the Act to depend upon the law for the time being in force relating to corporations (*h*). This power, so far as regards companies, has been already alluded to (*i*).

Bk. II. Chap. 4.
Sect. 3.

Instruments under seal may be negotiable (*k*) ; and by the Bills of Exchange Act, 1882 (*l*), if an incorporated company has power to draw, accept, or endorse a bill, and it does so under its corporate seal, the company is liable to be sued on the bill.

Instruments
under seal.

The Companies Act, 1862, expressly enacts that promissory notes and bills of exchange shall be deemed to be made, accepted, or endorsed on behalf of a company registered under the Act, if made, accepted, or endorsed in the name or by or on behalf or on account of the company, by any person acting under its authority (*m*).

Companies Act,
1862.

If a person accepts or endorses a bill "per pro," the taker of the bill or note so accepted or endorsed is bound to enquire as to the extent of such person's authority ; but if the acceptance or endorsement of the bill or note is within the limits of his real or apparent authority, his abuse of it does not affect a *bonâ fide* holder for value (*n*).

Acceptance, &c.
"per pro."

Moreover, if any director, manager, or officer of a limited company signs on behalf of the company any bill or note without adding the word "limited," he is personally liable to pay the same, unless it is duly paid by the company (*o*).

Omission of word
"limited."

The Industrial and Provident Societies Act, 1893, has a provision similar to that in the Companies Act, 1862 (*p*).

Industrial and
Provident
Societies Act.

Directors and others constantly make promissory notes, and draw and accept bills in such a manner as to make it very difficult to say whether they personally, or only the companies

Liability of
directors.

(*h*) *Ib.* § 22.

(*i*) Bk. II. c. 2, § 2, and *ante*, p. 242.

(*k*) See *Bechuanaland Exploration Co. v. London Trading Bank* [1898], 2 Q. B. 658, and other cases cited *infra*, p. 301.

(*l*) See 45 & 46 Vict. c. 61, § 91.

(*m*) 25 & 26 Vict. c. 89, § 47. See *Ex parte Overend, Gurney & Co.*, 4 Ch. 460; *Re Barber & Co.*, 9 Eq. 725.

(*n*) *Bryant, Powis & Bryant v. Banque du Peuple* [1893], A. C. 170; *Ex parte Overend, Gurney & Co.*, 4 Ch. 460. Compare *Jacobs v. Morris*, [1901] 1 Ch. 261.

(*o*) § 42; *Penrose v. Martyr*, E. B. & E. 499. As to companies not having profit for their object, see 30 & 31 Vict. c. 131, § 23.

(*p*) 56 & 57 Vict. c. 39, § 33. See, too, § 12.

Bk. II. Chap. 4. for whom they act, are liable upon the instruments (q). The
Sect. 3.

question is in every case one of construction; is the bill or note the bill or note of the company or not? Does it really purport so to be? for, although given for the purposes of the company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the company, the company will be liable upon it, and not the individuals whose names are on it (r), unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not.

The following cases illustrate these principles. A bill drawn on the directors of a company, and accepted for the company by its manager and three of its directors, binds the three directors who accept the bill, but no one else (s). *A fortiori*, a bill drawn on the agent of a company, and accepted by him simply in his own name, binds him and not the company (t). On the other hand, a bill drawn on a company and accepted by its directors, secretary, or other authorised agent on its behalf or as its agent, binds the company and not those who accept the bill, except so far as they are members of the company (u). But to this there is an exception in the case of limited companies, as already noticed (x).

Examples of the foregoing rules.

Thomas v. Bishop.

In *Thomas v. Bishop* (y), the bill was drawn on *John Bishop, cashier of the York Buildings Company*, and was accepted by Bishop in his own name, without reference to the company, and he was held by Lord Hardwicke to be personally liable on the bill.

Serrell v. The Derbyshire, &c., Railway Company.

In *Serrell v. The Derbyshire, Staffordshire, &c., Railway Company* (z), a

(q) See as regards firms, Partn. 190, *et seq.*

Bishop, 7 Mod. 180.

(r) This supposes that the bill is not *ultra vires*, for if it is those who give it will be liable, *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360. See also as to not adding "limited," *ante*, note (u).

(u) See *Edwards v. Barnard*, 32 Ch. D. 447; *Edwards v. Cameron's Coalbrook Co.*, 6 Ex. 269; *Halford v. Cameron's Coalbrook Co.*, 16 Q. B. 442, and *Eastwood v. Bain*, 3 H. & N. 738.

(x) See *ante*, p. 279, note (o).

(s) *Bull v. Morell*, 12 A. & E. 745.

(y) 7 Mod. 180.

(t) *Ducarrey v. Gill*, 1 Moo. & M. 450, and 4 C. & P. 121; *Thomas v.*

(z) 9 C. B. 811.

cheque was drawn on the bankers of a company, and was signed by three directors, and countersigned by the secretary, and on the cheque was a date stamp, with the name of the company in a circle round the date; but the company was held not liable upon the cheque, for it did not purport to be a cheque of the company. The persons who signed the cheque had not even signed it as directors. Bk. II. Chap. 4.
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In *Bult v. Morell* (a), the bill was drawn on *The Directors of the Imperial Salt and Alkali Company*, and was accepted for the *Imperial Salt and Alkali Company*, and signed

Richard Parker, Manager.
J. Ruinsford,
James Parker, } Directors.
Richard Garrett,

The three last-named persons only were held liable on the bill.

In *Nicholls v. Diamond* (b), the bill was drawn on "*Mr. James Diamond, purser, West Downs Mining Company*," and was accepted thus, "*James Diamond, accepted per proc. West Downs Mining Company*." Diamond was held liable on this bill. Nicholls v.
Diamond.

In *Mare v. Charles* (c), a bill was drawn on *Wm. Charles* for goods supplied to a mine, and was "*accepted for the company, Wm. Charles*," and this acceptance was held to render *Charles* solely liable. Mare v. Charles.

Similar principles are applicable to promissory notes. In the following cases the makers were held personally liable upon them:— Promissory
notes.

WE, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received on account of the company. Penkivil v.
Connell.

T. W. SUTHERLAND,
J. CONNELL,
M. BOYD,
A. DUFF, } Directors (d).

Midland Counties Building Society.

WE jointly and severally promise to pay, &c.

W. R. HEATH, } Directors.
S. B. SMITH, }

W. D. FISHER, Secretary (e).

Midland Counties Building Society.

Two months after demand in writing we promise to pay *Mr. Thomas Price* £100, for value received. Bottomley. v.
Fisher.

W. R. HEATH, } Trustees.
JOHN TAYLOR, }
W. D. FISHER, Secretary (f).

(a) 12 A. & E. 745.

(b) 9 Ex. 154.

(c) 5 E. & B. 978.

(d) *Penkivil v. Connell*, 5 Ex. 381.

See also *Healey v. Storey*, 3 Ex. 3.

(e) *Bottomley v. Fisher*, 1 H. & C. 211.

(f) *Price v. Taylor*, 5 H. & N. 540. Compare *Lindus v. Melrose*, *infra*, p. 283.

Bk. II. Chap. 4
Sect. 3.

Dutton v.
Marsh.

Even if the company's seal is affixed and attested, the directors signing the note will be liable if they promise to pay, as in *Dutton v. Marsh (g)*, where the note ran thus:—

WE, the directors of the *Isle of Man Slate Co., Limited*, do promise to pay J. D. £1,600, with interest at 6 per cent. till paid, for value received.

Signed by four directors.

The company's seal attested was in one corner.

Miller v.
Thompson.

In *Miller v. Thompson (h)* the following instrument, drawn on a joint-stock bank, by the manager of one of its branches, was held to be the promissory note of the directors of the bank, and to be binding on them personally:—

London Trades' Joint Stock Banking Company.

Dorking, Surrey, 24th August, 1839.

Six months after date, pay, without acceptance, to the order of John Cogan Francis, Esquire, £100, value received.

(Signed) For the directors,

THOMAS NEWHAM, Manager.

(Addressed) The London Trades' Joint Stock Banking Company, 33, Gracechurch Street, London.

Notes of com-
panies.

On the other hand, companies have been held bound by notes in the following forms:—

Aggs v.
Nicholson.

WE, two of the directors of the Ark Life Assurance Society by and on behalf of the society, do hereby promise to pay, &c., value received.

(Signed by two directors, and sealed with the seal of the company) (i).

MacLae v.
Sutherland.

WE, directors of the Royal Bank of Australia, for ourselves and other shareholders of the company, jointly and severally promise to pay, &c., for value received, on account of the company.

J. W. SUTHERLAND, Chairman.

ADAM DUFF,
JOHN MITCHELL, } Directors (k).

Entered, BENJAMIN WOOD, Secretary.

(g) L. R. 6 Q. B. 361.

(h) 3 Man. & Gr. 576.

(i) *Aggs v. Nicholson*, 1 H. & N.
165.

(k) *MacLae v. Sutherland*, 3 E. &
B. 1, held to be binding on the
members of the company jointly.

We jointly promise to pay, &c., for value received in stock, on Bk. II. Chap. 4.
account of the London and Birmingham Iron and Hardware Com- Sect. 3.
pany, Limited.

JAMES MELROSE,
G. N. WOOD, } Directors (l).
JOHN HARRIS, }

Lindus v.
Melrose.

EDWIN GUESS, Secretary.

The following instruments have also been held to be promissory notes binding on companies :—

To the CASHIER, *Sea, Fire, and Life Assurance Society.* Allen v. Sea,
CREDIT A., or order, with the sum of, &c., on account of this Fire, &c., Com-
corporation. pany.

A. DAVIS, } Directors (m).
W. OGILVIE, }

Entered, F. F. A., Accountant.

UNION BANK POST BILL.

AT sixty days after sight of this our first bill of exchange (second Forbes v.
and third of same tenor and date not paid), we promise to pay, Marshall.
on account of the proprietors of the Union Bank of Calcutta, &c.,
value received.

J. BENNIE, } Directors (n).
W. P. GRANT, }

H. W. ABBOTT, Secretary.

(l) *Lindus v. Melrose*, 2 H. & N. 293, and 3 ib. 177, held to bind the company and not the directors signing. Compare *Price v. Taylor*, 5 H. & N. 540, ante, p. 281.

(m) *Allen v. The Sea, Fire, and*

Life Assurance Co., 9 C. B. 574.

(n) *Forbes v. Marshall*, 11 Ex. 166.

The above instrument had an acceptance written across it, and might, it seems, have been treated as a bill of exchange.

CHAPTER V.

OF THE POWER OF COMPANIES TO BORROW AND OF MATTERS
CONNECTED THEREWITH.SECTION I.—OF THE POWER OF COMPANIES AND THEIR DIRECTORS
TO BORROW.Borrowing
money.

ONE of the most important questions respecting the power of companies is whether they have power to borrow money; but inasmuch as money borrowed by or on behalf of companies is usually borrowed by their directors, the question which arises in practice is whether the company is liable for money borrowed by its directors.

Borrowing *ultra*
vires.

Whenever this question arises, the first point to determine is whether the company is one which cannot lawfully borrow money at all, for if all borrowing is *ultra vires*, it follows that the company cannot be liable as debtor (a) to repay what its directors may have assumed to borrow for it (b). The liability of the directors in such cases is discussed elsewhere (c).

Supposing that all borrowing is not *ultra vires*, the next point to determine is whether there is any statutory or other limit to the amount which may be borrowed; and whether this amount has been already raised so as to render any further exercise of the power to borrow, not only irregular and improper as an excess of authority, but wholly *ultra vires*. If the latter be the case, it will again follow that, to the extent to which the borrowing powers have been exceeded, the company will not be liable to repay what may in fact have been borrowed in its name and on its credit (d).

(a) As to liability arising from the application of the money, see *infra*, p. 292, *et seq.*

(b) *Montreal Assurance Co. v. McGillivray*, 13 Moo. P. C. 87, and the cases in note (d).

(c) See *infra*, p. 349, *et seq.*

(d) *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61, and 9 App. Ca. 857; *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 675, note, and 10 App. Ca. 354; and

Supposing, thirdly, that borrowing is not *ultra vires* as regards the company, its liability for money borrowed in its name will depend upon whether the directors had authority, express or implied, to borrow money for the company; for if not, the company will not be liable to repay what its directors may in fact have borrowed for it, unless the company has ratified the borrowing (e).

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Borrowing
intra vires.

Supposing, lastly, that borrowing is *intra vires* so far as the company is concerned, and that the directors have implied though no express authority to borrow, and they do borrow money for and on behalf of the company, then the company will be liable to repay it, unless there has been some excess of authority known to the lender (f).

Cases in which the directors of a company have power to borrow, and do borrow for and in the name of the company, give rise to no difficulty as regards the liability of the company, and need not be further alluded to.

Again, cases in which the directors of a company borrow as principals, and not for or in the name of the company, give rise to no difficulty as to the liability of the company to the lenders, for *ex hypothesi* the money borrowed has not been lent to or borrowed by the company.

When money is so borrowed for a company as to render the company liable to repay it as a legal debt of its own, it is quite immaterial to the lender what has been done with the money; the application of the money in the case supposed is no concern of his, and in no way affects his rights as against the company. But if money is so borrowed for a company as not to render the company liable to repay it as a legal debt of its own, still the lender may not be wholly without remedy against the company. The application of the money then becomes important, and may render the company liable in equity to repay him in whole or in part, as will be more fully explained hereafter (*infra*, § 2).

Application of
the money.

Whether all borrowing is *ultra vires*, whether only borrowing beyond a certain amount is *ultra vires*, whether there is any

see further on other points, 38 Ch.
D. 534, aff. 36 ib. 674, and 19 Q. B.
D. 155.

(e) See *ante*, p. 218 &c., p. 231 &c.

(f) See *ib*.

Bk. II. Chap. 5. and what authority on the part of directors or others to borrow
Sect. 1.

(assuming no question of *ultra vires* to arise), are all questions which depend on the nature of a company's business, and upon the terms of its charter, Act of Parliament, deed of settlement, or regulations.

It is very seldom that the nature of a company is such as to render all borrowing under all circumstances *ultra vires*, so that even all its members cannot sanction a loan to it for any purpose.

Limited
power to
borrow.

But there are numberless companies which have by statute or charter power to borrow to a limited extent (*g*), and there are numerous cases establishing that loans to such companies beyond the authorised amount are invalid. The two most recent and instructive decisions on this point are *Baroness Wenlock v. River Dee Co.*, and *The Blackburn Building Society v. Cunliffe, Brooks & Co.*

Baroness Wen-
lock v. River
Dee Company.

In the *Baroness Wenlock v. The River Dee Co. (h)*, a company was formed to improve the river Dee and lands adjoining, and was empowered to borrow 25,000*l.* on mortgage. The directors borrowed 85,000*l.*, which was applied in paying off a previous mortgage of 60,000*l.* In an action to recover the 85,000*l.* and interest, it was held that the plaintiff was only entitled to recover 25,000*l.*, and so much more as had been applied in payment of debts and liabilities of the company properly incurred (*i*).

If the power of borrowing is limited by reference to the uncalled capital of the company, it has been held that the whole nominal share capital, whether issued or unissued, is to be taken into account (*k*).

(*g*) *E.g.*, railway, canal, and other companies which obtain special Acts and limited borrowing powers. See, as to them, 8 & 9 Vict. c. 16, §§ 38, *et seq.*; 26 & 27 Vict. c. 118, §§ 22—35; 29 & 30 Vict. c. 108; 32 & 33 Vict. c. 48, § 1; and 38 & 39 Vict. c. 66. As to loan notes, &c., improperly issued, see 7 & 8 Vict. c. 85, § 19.

(*h*) 10 App. Ca. 354, and 36 Ch. D. 675, note, and 19 Q. B. D. 155.

See also *Landowners, &c., Inclosure Co. v. Ashford*, 16 Ch. D. 411; and *Wrexham, Mold, &c., Rail. Co.* [1899], 1 Ch. 205 and 440.

(*i*) See as to this, *infra*, p. 292 *et seq.*

(*k*) *English Channel Steamship Co. v. Rolt*, 17 Ch. D. 715. As to Indian railway companies which have taken advantage of the Indian Railways Act, 1894, see § 7 of that Act.

The borrowing powers of incorporated benefit building societies are strictly defined by statute (*l*), and the rules must state whether the society intends to borrow money, and if so, within what limits not exceeding those prescribed by the statute (*m*). Unincorporated building societies may borrow if authorised to do so by their rules and within the limits (if any) thereby imposed. The rules of these societies may confer an unlimited power of borrowing on the credit of the society's assets (*n*), but cannot authorise borrowing on the personal credit of the members (*o*).

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Sect. 1.

Building
societies.

But apart from the Acts and the rules a building society has no power to borrow (*p*). Consequently if money is borrowed by the managers of the society for it, the society itself is not liable to repay the amount (*q*), although all persons who are managers at the time when the money is borrowed are by virtue of an express enactment to that effect personally liable to repay it (*r*). So stringent is the law limiting the borrowing powers of these societies, that if money is borrowed beyond the authorised amount, and the amount so borrowed is actually repaid out of the funds of the society, such an application of the funds is *ultra vires*, and the amount so repaid can be recovered back by the society from the lender of the money. This was decided in *The Blackburn, &c., Building Society v. Cunliffe, Brooks & Co.*

Blackburn
Building Society
v. Cunliffe,
Brooks & Co.

(*l*) 37 & 38 Vict. c. 42, §§ 15, 16 ; 38 Vict. c. 39.

Soc., 23 Ch. D. p. 453.

(*m*) Building Societies Act, 1894, § 1. As to the mode of calculating the limit, see *ib.* § 14, and *Neath Building Society v. Luce*, 43 Ch. D. 158.

(*o*) *West London, &c., Build. Society* [1894], 2 Ch. 352.

(*n*) *West London, &c., Build. Society* [1894], 2 Ch. 352 ; *Murray v. Scott*, 9 App. Ca. 519, and 23 Ch. D. 440, *sub nom.* *Guardian Permanent Build. Soc.* ; *Mutual Aid Build. Soc.*, 29 Ch. D. 182, and 30 *ib.* 434 ; *Laing v. Reed*, 5 Ch. 4. These authorities overrule *Hill's case*, 9 Eq. 605, and *Davis' case*, 12 Eq. 516. See as to the difference between borrowing money and receiving money for shares in advance, *Guardian, &c., Building*

(*p*) See, in addition to the cases cited below, *Kent Benefit Build. Soc.*, 1 Dr. & Sm. 417 ; *Ex parte Williamson*, 5 Ch. 309.

(*q*) *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696 ; *Blackburn Build. Soc. v. Cunliffe, Brooks & Co.*, 29 Ch. D. 902. See also *Ex parte Watson*, 21 Q. B. D. 301, where the society acquired borrowing powers and then gave a note for money previously borrowed.

(*r*) 37 & 38 Vict. c. 42, § 43 ; *Cross v. Fisher* [1892], 1 Q. B. 467 ; *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696 ; *Looker v. Wrigley*, 9 Q. B. D. 397.

Bk. II. Chap. 5. *Co. (s)*. It had been previously decided that the bankers
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could not recover the amount of the society's overdraft nor hold securities given for it except to the extent to which the moneys advanced had been properly applied in discharging liabilities of the company (*t*).

Ex parte
Watson.

It has also been decided that where money was borrowed for a building society which had no power to borrow, a note given by it for repayment of the money was invalid, although the society had acquired power to borrow before it gave the note (*u*). There was in this case no compromise and no consideration for the note to render it *intra vires*. The note was clearly not given for money borrowed when there was power to borrow; there was no fresh borrowing.

Forged Transfer
Acts.

The Forged Transfer Acts, 1891 and 1892, empower companies incorporated by or in pursuance of any Act of Parliament or royal charter, and incorporated building societies and certain other incorporated societies, to borrow on the security of their property for the purpose of providing compensation for losses arising from forged transfers (*x*).

Companies Act,
1900, § 6.

The conditions which the Companies Act, 1900, requires to be fulfilled, in those cases in which there is an invitation to the public to subscribe for shares, before a company, registered under the Companies Act, 1862, after the 31st December, 1900, can exercise any borrowing power, and the consequences of borrowing before those conditions have been fulfilled, have been already discussed (*y*).

Implied
power to
borrow.

Passing to cases unaffected by the doctrines of *ultra vires*, the directors of ordinary trading companies, whose regulations are silent on the subject of borrowing, have an implied power to borrow for the purposes of the business of the company (*z*), but the directors of other companies have, it is conceived, no such implied power (*a*). In one case it was held that no power

(*s*) 29 Ch. D. 902.

(*y*) *Ante*, p. 209, and p. 230.

(*t*) *Cunliffe, Brooks & Co. v. Blackburn Build. Soc.*, 9 App. Ca. 857, and 22 Ch. D. 61.

(*z*) *General Auction, Estate, &c., Co. v. Smith* [1891], 3 Ch. 433; *Ex parte Pitman and Edwards*, 12 Ch. D. 707, and the next five notes.

(*u*) *Ex parte Watson*, 21 Q. B. D. 301.

(*a*) See the judgment of L. J.

(*x*) 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36.

Bowen in 36 Ch. D. 685, note.

to borrow in a particular manner, viz., on irredeemable stock, was implied though under the provisions of a statute applicable to the corporation in question the power was assumed to exist (b). Bk. II. Chap. 5.
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A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company (c). Moreover, although the directors of a company may have no power to borrow, power so to do may be conferred upon them by the shareholders; for this is a matter as to which a majority can bind a minority (d), unless borrowing is *ultra vires* as regards the company itself. Further, if the directors have already power to do whatever the company itself can do, this includes a power to borrow (e), if to borrow is *intra vires* as regards the company. Moreover, a special power given to the directors to borrow to a certain extent does not preclude the company from borrowing to a greater extent with the sanction of the shareholders (f).

Borrowing imports the creation of the relation of debtor and creditor, and whenever money is obtained upon terms which produce this relation, there is in substance a borrowing; e.g., overdrawing a banking account is borrowing (g). But mortgages and charges may be created on property, and the remedy

What is borrowing.

(b) *Sheffield Corporation v. Sheffield Electric Light Co.* [1898], 1 Ch. 203; the Act under which the corporation had power to issue the stock was repealed by an Act passed on the same day as the Act which assumed its existence and which came into operation one day later.

(c) *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152, and 12 Jur. 189; *MacLae v. Sutherland*, 3 E. & B. 1; *Royal Brit. Bank v. Turquand*, 5 ib. 248, and 6 ib. 327; *Galloway's case*, 18 Jur. 885.

(d) *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123, but not in the case of unincorporated building societies, see 29 Ch. D. 902.

(e) *Australian Steam Clipper Co. v. Mounsey*, 4 K. & J. 733; *Gibbs and West's case*, 10 Eq. 312.

(f) *Irvine v. Union Bank of Australia*, 2 App. Ca. at p. 374.

(g) *Wrexham, Mold, &c. Rail. Co.* [1899], 1 Ch. 205 and 440; *Pyle Works (No. 2)* [1891], 1 Ch. 173; *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 9 App. Ca. 837, and 22 Ch. D. 61; *Landowners' &c. Inclosure Co. v. Ashford*, 16 Ch. D. 437; *Looker v. Wrigley*, 9 Q. B. D. 397. *Waterlow v. Sharp*, 8 Eq. 501, and *Cefn Cilcen Mining Co.*, 7 Eq. 88, *contra*, are overruled by the above.

Bk. II. Chap. 5. of the lender may be confined to realising his security; whether
Sect. 1. such securities are valid as against any particular company, must be decided upon the principles already explained. But where directors have no power to borrow, they have no power to raise money on such securities, unless such power can be shown to exist (*h*).

It is not, however, every transaction by which money is obtained that can be considered borrowing, even although the transaction involves the payment of money, by the person who obtains the money, to the person from whom it is procured; the transaction may be a sale and resale or rehiring, and such a transaction, if *bonâ fide* and not a borrowing in disguise, will be valid, although there may be no power to borrow (*i*). Further, giving a note for an existing debt not due from the company is not a borrowing by the company (*k*).

Increasing capital.

Bryon v. Metropolitan Saloon Omnibus Company.

Connected with the subject of borrowing money, is increasing capital. The difference between them is illustrated by *Bryon v. Metropolitan Saloon Omnibus Company* (*l*). In that case the capital of a limited joint-stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied on had no application to the case; the capital of the company being one thing, and that which was sought to be increased by borrowing (*viz.*, the cash in hand) being a different thing.

Obtaining goods on credit.

The difference between borrowing money and procuring goods or services on credit is not only obvious (*m*), but is

(*h*) See *Baroness Wenlock v. River Dee Co.*, *ubi supra*.

(*i*) *Yorkshire Rail. Wagon Co. v. Maclure*, 19 Ch. D. 478, and 21 ib. 309; see, too, *Manchester, Sheffield, &c. Rail. Co. v. North Central Wagon Co.*, 13 App. Ca. 554, and 35 Ch. D. 191.

(*k*) *Ex parte Watson*, 21 Q. B. D. 301.

(*l*) 3 De G. & J. 123; see, too, *General Auction, &c. Co. v. Smith* [1891], 3 Ch. 439.

(*m*) Partn. 145; and see *Pyle Works* (No. 2) [1891], 1 Ch. 173.

practically important, as is shown by the cases in which members of cost-book mining companies have been held liable for goods supplied to the mine (*n*), but not for money borrowed (*o*). Moreover, an authority to make or draw promissory notes or bills of exchange in connection with the purchase of goods does not necessarily authorise the borrowing of money by such means (*p*).

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An authority to borrow on debentures or other security will authorise the issue of debentures, or the grant of a mortgage, to indemnify a person who in order to enable the company to borrow money has guaranteed its repayment on condition of having such an indemnity given to him (*q*), or to secure or discharge existing debts for which the company is either directly (*r*) or, under a contract to indemnify the debtor, ultimately (*s*) liable. Where directors have power to borrow on mortgage but not on bills of exchange, a mortgage to secure money borrowed, and for which bills have been given, is not invalid (*t*). Indeed, where the power to borrow exists and money is borrowed, a debt is contracted, although the security given for it may be informal (*u*).

Exercise of
power to borrow.

Where the directors of a company have power to borrow, there is nothing now to prevent a loan to the company by one of themselves (*x*).

Loans by
directors.

As to *Bills of Exchange and Promissory Notes*, see *ante*, pp. 242 and 278 *et seq.*; as to *Bonds*, *ante*, p. 244.

(*n*) *Tredwen v. Bourne*, 6 M. & W. 461; *Hawken v. Bourne*, 8 ib. 703.

12 Jur. 407.

(*o*) *Hawtayne v. Bourne*, 7 M. & W. 595; *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252; *Beldon v. Campbell*, 6 Ex. 886.

(*s*) *Seligman v. Prince & Co.* [1895], 2 Ch. 617.

(*p*) *Morris v. Jacobs* [1901], 1 Ch. 261.

(*t*) *Scott v. Colburn*, 26 Beav. 276.
(*u*) See *Re Queensland Land, &c. Co.*, *Davis v. Martin* [1894], 3 Ch. 180; *Strand Music Hall Co.*, 3 De G. J. & Sm. 147; *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43.

(*q*) *Pyle Works* (No. 2) [1891], 1 Ch. 173.

(*x*) *General Auction Co. v. Smith* [1891], 3 Ch. 432; *Campbell's case*, 4 Ch. D. 470. It was otherwise under 7 & 8 Vict. c. 110, as to which see *Teversham v. Cameron's Coalbrook Co.*, 3 De G. & S. 296; *Baker's case*, 1 Dr. & Sm. 55; *Murray's Ex. case*, 5 De G. M. & G. 746.

(*r*) *Ex parte Birmingham Banking Co.*, 6 Ch. 83; *Howard v. Patent Ivory &c. Co.*, 38 Ch. D. p. 169; *Inns of Court Hotel Co.*, 6 Eq. 82; *West Cornwall Rail. Co. v. Mowatt*,

SECTION II.—OF INVALID LOANS, &c., OF WHICH THE COMPANY
HAS HAD THE BENEFIT.

Bk. II. Chap. 5. It is obvious that one person may be benefited by a contract
sect. 2. - made by others without being himself in any way bound by it. A loan to A. cannot be recovered from B. simply because the money lent has come into his hands (y). So if the directors of a company enter into a contract which is not binding on the company, either upon the ground that the contract is *ultra vires* or upon any other ground, the company is not liable on the contract simply because it has had the benefit thereof (z).

It has been already seen that a company is not, under ordinary circumstances, liable on contracts entered into by its promoters before its formation, although it may have had the benefit of such contracts (a). Further, a company which has benefited by a contract not binding on it, is not to be deemed to have thereby ratified that contract; nor to have incurred an obligation *quasi ex contractu*, similar to that which would have been incurred if the contract had been binding on the company in the first instance (b).

Recovery of consideration which has failed.

At the same time, a company is liable to refund money which it has received without consideration, *e.g.*, premiums paid to it in respect of policies which it had no power to grant (c); and money received in respect of shares the contract to take which afterwards fails or is rescinded (d).

Exception to general rule.

There is, however, a very important exception to the general rule against liability by reason of benefits received. It has been long settled in equity that although an infant is not liable at law for money borrowed although expended in necessities, nevertheless a person who *bonâ fide* advances money to

(y) Partn. 199. See *Emly v. Lye*, 15 East, 7, and other cases there cited.

(z) See, in addition to the cases cited below, *The Worcester Corn Ex. Co.*, 3 D. G. M. & G. 180; *Fisher v. Taylor*, 2 Ha. 218.

(a) *Ante*, Bk. II. c. 1, § 2.

(b) *Ex parte Williamson*, 5 Ch. 309; *Cork and Youghal Rail. Co.*, 4

Ch. 748; *Hill's case*, 9 Eq. 605; *Chambers v. Manchester and Milford Rail. Co.*, 5 B. & S. 588. See, also, *per Parke, B.*, in *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 142, and the cases in the last few notes.

(c) *Phoenix Ass. Co., Burges' and Stock's case*, 2 J. & H. 441.

(d) *Ante*, pp. 38 and 92 note (d).

an infant is entitled, on the administration of the infant's estate, to rank as a creditor in respect of so much of the money advanced as has in fact been expended in necessities (*e*). A similar rule has been applied to money lent to married women and expended in properly maintaining them (*f*). There is a further well settled rule that agents and trustees are entitled to be indemnified by their principals and *cestuis que trustent* against all expenses properly incurred in the exercise of their authority or the execution of their trust. From these doctrines there has been developed a rule to the effect that a company is liable in equity to refund money improperly borrowed by its directors on its behalf but in fact *bonâ fide* applied in discharging debts or liabilities of the company which could have been enforced against it.

At first this equitable doctrine was based on the principle of subrogation, the person making the advance being held entitled in equity to stand in the place of the creditor paid off (*g*); and this view prevailed until it was found to lead to consequences which showed it to be erroneous. The underlying principle in the case of companies which have borrowed in excess of their powers is that if the money so borrowed has been applied in discharging the legitimate liabilities of the company, such borrowing has not in fact increased the company's liabilities, and the company has not in substance exceeded its powers; in equity therefore the advance is treated as valid to the extent of its legitimate application (*h*). The consequence is that the person who has made the advance is not entitled by reason of its application to any greater rights than if his advance had been in fact valid, and is not therefore entitled to the benefit of any securities held by the creditors who have been paid off out of the moneys advanced (*i*);

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Principle of
the equitable
doctrine.

(*e*) *Marlow v. Pitfield*, 1 P. W. 558.

(*f*) *Jenner v. Morris*, 1 Dr. & Sm. 218; *Deare v. Soutten*, 9 Eq. 151.

(*g*) See *Ex parte Williamson*, 5 Ch. 313; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155, per Fry, L. J.

(*h*) See per Lord Selborne, 22 Ch.

D. 71, and the case in the next note.

(*i*) *Wregham, Mold, &c. Rail. Co.* [1899], 1 Ch. 440; affirming [1898], 2 Ch. 663 and [1899], 1 Ch. 205, where the principles of the doctrine are carefully considered and the earlier cases explained. See also *infra*, p. 296.

Bk. II. Chap. 5. but he is entitled to the extent above mentioned to the benefit
Sect. 2.

of any securities, if otherwise valid, given to him by the company (k). Moreover it is immaterial whether the debts paid off out of the advance were in existence when the advance was made, or arose subsequently (l).

It has also been decided that the lender in these cases is not only entitled to be repaid his advances applied in paying off liabilities of the company, but that he is also entitled to any securities obtained by the company by means of his advances (m). This is not subrogation, nor a consequence of the more modern doctrine above explained. The ground of the decision seems to be the injustice of allowing the company to keep the property procured by the loan without repaying the latter (n), but it is perhaps open to question whether the decisions have not been too favourable to the lender in this respect (o).

The liability of companies for money improperly borrowed but applied in discharging liabilities grew out of the celebrated decision in the *German Mining Company's case* (p), which will be noticed hereafter when considering the rights of directors to indemnity (Bk. III. c. 2, § 3). Some early decisions professedly based upon that case may have gone too far; but any tendency in that direction has been checked by more recent decisions (q). The following are the leading cases applicable to lenders who were not directors or trustees of the borrowing company, and who were not therefore entitled to indemnity on grounds peculiar to such persons.

Cork v. Youghal
Railway Com-
pany.

In *Re The Cork and Youghal Railway Company* (r), the holders of some invalid Lloyd's bonds (s) were held not entitled

(k) *Blackburn Building Society v.* 5 Ch. 309, and *infra*, p. 296.

Cunliffe, Brooks & Co., 22 Ch. D. 61;
9 App. Cas. 857.

(l) *Baroness Wenlock v. River Dee*
Co., 19 Q. B. D. 155.

(m) *Blackburn Building Society v.*
Cunliffe, Brooks & Co., 29 Ch. D.
902 (see p. 912); *Neath Building*
Society v. Luce, 43 Ch. D. 158.

(n) See *Cork and Youghal Rail.*
Co., 4 Ch. 748.

(o) Compare *Ex parte Williamson*,

(p) *Ex parte Chippendale*, 4 De
G. M. & G. 119.

(q) See per Lord Justice Giffard
in *Ex parte Williamson*, L. R. 5 Ch.
313.

(r) 4 Ch. 748. See also *National*
Permanent Benefit Building Soc., 5
Ch. 309; *Magdalena Steam Nav.*
Co., Johns. 690.

(s) As to which see *ante*, p. 244.

to rank as creditors of the company for the amounts of the bonds, but were held entitled to be paid so much of those amounts as they could prove had been properly applied for the legitimate purposes of the company; and an inquiry on this head was directed.

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In the *Blackburn Building Society v. Cunliffe, Brooks & Company* (t), a building society was not only held not to be liable to repay money improperly borrowed from their bankers by its directors, but was held entitled to recover from the lenders the sums repaid to them out of the funds of the society. But here again an exception was made in respect of those sums which the bankers could prove to have been applied in discharging the debts and liabilities of the society, and the bankers were also allowed to hold the deeds which had been deposited with them to secure the money borrowed, as security for the sums which had been so applied (u), and to have the benefit of securities which had been obtained by the society by means of the money borrowed (x).

Blackburn
Building Society
v. Cunliffe & Co.

The same principle affords an explanation of certain cases in which transferees of debentures, issued *ultra vires* but in the name of a company, have been held entitled to recover from the company the value of the consideration received by it for such debentures.

Thus, in the grossly fraudulent case of the *Athenæum Life Assurance Society v. Pooley* (y), where debentures of a company given in exchange for Westminster improvement bonds were decided to be invalid in the hands of a *bonâ fide* purchaser for value, the purchaser was held entitled to an inquiry whether the company had received any benefit from the bonds. Again, in the similar and subsequent cases of *Wood's Claim* and *Brown's Claim* (z), Westminster bonds were sold to an insurance

Athenæum As-
surance Society
v. Pooley.

Wood's Claim.

(t) 9 App. Ca. 857, and 22 Ch. D. 61, and 29 ib. 902, noticed *ante*, p. 287.

(u) 22 Ch. D. 61. The House of Lords expressed no opinion as to the bank's right to these securities.

(z) 29 Ch. D. 902. See, too, *Neath Building Society v. Luce*, 43 Ch. D. 165, where the lender was

held entitled to the full amount of the securities so obtained, though such amount was 10 per cent. more than the amount lent by the society on them. Compare with these cases *Ex parte Williamson*, 5 Ch. 309.

(y) 3 De G. & J. 294.

(z) 9 W. R. 366, and 10 ib. 662.

Bk. II. Chap. 5. Sect. 2. company for money debentures and shares. The transaction was held invalid; and it appearing that the bonds were worth more than the company gave for them, and that the company had had the benefit of the excess, the company was debited with such excess in an account directed between the company and the vendor; and he, on the other hand, was debited with the money paid to him by the company and with the sums realised by him by the sale of the debentures and shares.

Limits of doctrine.

The doctrine in question does not extend to allowing the person who has made the advance the benefit of securities held by the creditors whose debts had been paid off out of the moneys advanced.

Wrexham Mold and Connah's Quay Railway Co.

In *Wrexham, Mold and Connah's Quay Railway Co.* (a) the company had power to borrow money by the creation of three classes of debenture stock A, B, and C, A having priority over B and B over C. The company issued the whole of these stocks and thereby exhausted its borrowing powers. The interest on the stocks fell into arrear and the company borrowed money from their bankers to pay the interest. The bank claimed to be entitled in respect of the moneys so applied to the benefit of the securities and priorities of the stockholders, but the Court decided against this claim on the ground that if the advance had been a valid one the bank would have had no right to the securities or priorities of the creditors paid off, and that they were not entitled to stand in a better position because the advance was invalid.

Ex parte Williamson.

The mere fact that the company has had the use of the money is not enough to create an obligation to repay it; so to hold would render nugatory all prohibition against borrowing. Accordingly where the managers of a building society borrowed money for the society, but in excess of their powers, and the money so borrowed was advanced to members on the security of their shares, it was held that the lenders had no claim against the society either as creditors at law or by reason of the application of the money (b).

(a) [1899], 1 Ch. 440, affirming ib. [1898], 2 Ch. 663, and [1899], 1 Ch. 205. The earlier cases and the principles of the doctrine are dis-

cussed in the judgments of the Court of Appeal.

(b) *Ex parte Williamson*, 5 Ch. 309. Compare cases *ante*, p. 295, note (x).

The following case also shows that the doctrine in question, Bk. II. Chap. 5. cannot be extended so as to defeat a company's special Act. Sect. 2.

In *Baroness Wenlock v. River Dee Company* (c) a company Barones Wenlock v. River Dee Company. was created by Act of Parliament for the purpose of embanking the river Dee and improving the lands near its mouth. Limited powers of borrowing and of mortgaging were conferred by the Act. The directors borrowed money largely in excess of their powers; but the money to a great extent at least was *bonâ fide* applied for the legitimate purposes of the company, i.e., in doing the work which the company was formed to do, and in paying off pre-existing mortgages, some of which were valid and others invalid. The money thus borrowed was held not recoverable as a debt (d); but so much of the money as had been applied in paying off existing valid mortgages and in payment of any debts and liabilities properly incurred, whether before or after the money was borrowed (e), was held to be recoverable (f). But the money applied in paying off one of the invalid mortgages was held to be no charge on the lands, although the money raised by such invalid mortgage had been spent in embanking the river and reclaiming the land adjoining it. The ground of this decision (g) was that to hold the money so applied to be a charge would be to contravene the terms of the company's special Act.

Moreover, the doctrine in question has no application unless there has been in fact an advance to the company from the person whose right is sought to be enforced. Thus, where a building Portsea Island Building Society v. Barclay. society which had exhausted its borrowing powers, and had no power to borrow on or otherwise accept a second mortgage, being in want of money, requested A. to advance money to H., a person indebted to them, on the terms that A. should have a first mortgage on the property of H., upon which the society at that time held a first mortgage, and that the society's mortgage should be postponed, and A. made the advance to H. on these terms and H. paid the money to the society in reduction

(c) 10 App. Ca. 354; 19 Q. B. D. D. 675, note.
 155; and 36 Ch. D. 674; 38 ib. 534. (g) 38 Ch. D. 534, and 36 ib. 674.
 (d) 10 App. Ca. 354, *ante*, p. 286. The mortgage above referred to as
 (e) 19 Q. B. D. 155. invalid was the mortgage for 6,405/
 (f) 10 App. Ca. 354, and 36 Ch. to the Lands Improvement Co.

Bk. II. Chap. 5. of his debt to them, it was held that the transaction was
 Sect. 2. — *ultra vires*, and that whether the money had or had not been employed in payment of the society's legitimate creditors, A. who had advanced the money to H. and purposely avoided making the advance to the society, could not claim the benefit of the doctrine (*h*).

SECTION III.—OF MORTGAGES AND PLEDGES.

The validity as against a company of mortgages and pledges of its property depends on the principles explained in the first section of this chapter and in the second section of Chapter II. of the present book. It has been held that a trading company can give a valid bill of sale to secure a debt of the company (*i*) ; that the directors of a steam ship company having general powers of management can mortgage its ships for money borrowed (*k*), and that the directors of a manufacturing or trading company with similar powers can equitably mortgage its property by depositing its deeds (*l*).

Validity of securities improperly issued.

The validity of other securities improperly issued also depends on the principles above explained. If they are *ultra vires* they are invalid and worthless even in the hands of *bonâ fide* holders for value, except so far as the money they represent can be recovered by reason of its having been applied for the benefit of the company (*m*). Even where the doctrines of *ultra vires* do not apply, securities which are improperly issued are invalid in the hands of persons having notice of the impropriety (*n*), unless they have acquired them for value from some one in whose hands they were valid (*o*). They are also invalid in the

(*h*) [1895] 2 Ch. 298, affirming [1894] 3 Ch. 86. A.'s mortgage was postponed to the society's mortgage on the ground that an agreement allowing it to rank *pari passu* with their mortgage would have been *ultra vires*.

(*i*) *Shears v. Jacob*, L. R. 1 C. P. 513; *Deffell v. White*, L. R. 2 C. P. 144.

(*k*) *Australian Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

(*l*) *Ex parte National Bank*, 14

Eq. 507; *Patent File Co.*, 6 Ch. 83; *General Auction, &c. Co. v. Smith* [1891], 3 Ch. 432.

(*m*) See *ante*, p. 214 *et seq.* and p. 292 *et seq.*, *Landowners, &c. Inclosure Co. v. Ashford*, 16 Ch. D. 434.

(*n*) *Howart v. Patent Ivory, &c. Co.*, 38 Ch. D. 156. As to persons having no notice of the impropriety, see *ante*, p. 218, *et seq.*

(*o*) *Whitworth's claim* [1901], 1 Ch. 115, noticed *ante*, p. 226.

hands of transferees from holders in whose hands they were invalid if the securities are mere choses in action and are not negotiable, and if the company is not estopped as against such transferees from denying the validity of the securities (p). But if the securities are negotiable (q), or if they create a legal charge (r), or if, not being negotiable but mere choses in action, the company is estopped, as against a *bonâ fide* transferee for value without notice of any impropriety, from disputing their validity (s) such a transferee can enforce them against the company.

Debentures or other securities given by a company after its borrowing powers have commenced for debts properly incurred before that time are valid (t).

The statutes relating to the registration of companies' securities under the Bills of Sale Act and the Companies Acts will be referred to when treating of Debentures (see *infra*, p. 310 *et seq.*).

Charges on uncalled capital are discussed *infra*, p. 315 *et seq.* As to companies governed by the Companies Clauses Consolidation Acts, see *infra*, p. 343 *et seq.*

SECTION IV.—OF DEBENTURES AND DEBENTURE STOCK OF COMPANIES GOVERNED BY THE COMPANIES ACTS.

Since the last edition of this work was published, debentures and debenture stock issued by companies governed by the Companies Acts (u) and actions to enforce these securities have assumed such importance and given rise to so many decisions, that it has been thought advisable in the present

(p) *Athenæum Life Ass. Co. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294, *ante*, pp. 236, 237.

(q) See p. 301.

(r) This is inserted on general principles; no case actually deciding the point has been found.

(s) As in *Davies v. R. Bolton & Co.* [1894], 3 Ch. 678; *Romford Canal Co., Carew's claim*, 24 Ch. D. 85; *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, and *ante*,

p. 224.

(t) *Re Bagnalstown v. Wexford Rail. Co.*, Ir. R. 4 Eq. 505, where the previous authorities are reviewed.

(u) For debentures, debenture stock and similar securities issued under statutory powers by companies governed by the Companies Clauses Acts and the Railway Acts, see *infra*, p. 343 *et seq.*

11k. II. Chap. 5. Sect. 4. edition to deal with these subjects as a whole and under one head. This necessitates some departure from the logical arrangement of the present treatise, but it is hoped that any disadvantage arising from this cause will be more than counter-balanced by the practical advantage of increased convenience and facility of reference.

1. *General Observations on Debentures, Debenture Stock, and Trust Deeds.*

Debentures and debenture stock of companies governed by the Companies Act, 1862, are not as a rule (*x*) issued under any statutory power, nor, with some few exceptions (*y*), are the rights of the holders regulated by statute; their rights depend upon contract, or, in other words, upon the terms of their securities and the nature of the charge (if any) therein contained.

Meaning of
debenture.

The word debenture, though of frequent occurrence in connection with companies, has no definite legal meaning (*z*).

Form and
nature of
debentures.

What is called a debenture may be a mere promise in writing to pay (*a*), a covenant or promise to pay under seal (*b*), or a mortgage or charge under the seal of the company (*c*). Usually a debenture is one of a series, but it need not be so (*d*). Debentures are sometimes made payable to bearer (*e*) or to

(*x*) See, however, the Mortgage Debenture Act, 1865, mentioned *infra*, pp. 346, 347.

(*y*) Such as the invalidity of unregistered mortgages or charges, see *infra*, p. 311 *et seq.*, or the rights under the Conveyancing and Law of Property Act, 1881, if and when that Act applies see *infra*, p. 331 *et seq.*

(*z*) *British India Steam Nav. Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; *Edmond v. Blain's Furnaces Co.*, 36 Ch. D. 215; *Lery v. Abercorris Slate Co.*, 37 Ch. D. 260; *Topham v. Greenside Fire Brick Co.*, 37 Ch. D. 281; *City of London Brewery v. Commissioners of Inland Revenue* [1899], 1 Q. B. 121, and *Palmer's Company Precedents*

(8th ed.), Part III., pp. 1 *et seq.*

(*a*) As in *British India Steam Nav. Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165.

(*b*) As in *Ex parte New Zealand Banking Corp.*, L. R. 3 Ch. 154; *Ex parte City Bank*, *ib.* 758.

(*c*) As in *Ex parte Moor*, 10 Ch. D. 530; *Ex parte Bradshaw*, 15 Ch. D. 465, in which cases the charge was created rather by implication than direct expression; *New Clydach Sheet, &c. Co.*, 6 Eq. 514, and the great majority of recent cases.

(*d*) *Edmonds v. Blain's Furnaces Co.*, 36 Ch. D. 215; *Lery v. Abercorris Slate Co.*, 37 Ch. D. 260; and *Robson v. Smith* [1895], 2 Ch. 118.

(*e*) As in *Ex parte New Zealand Banking Corp.*, 3 Ch. 154.

order (*f*), but are more usually made payable to the registered holder (*g*). In such case the debentures are usually made transferable by an instrument in writing, signed by the registered holder or his personal representatives, which the company is bound to register on payment of a small fee and such evidence of identity or title as it may reasonably require (*h*). Debentures to bearer or order will be promissory notes, and negotiable, if they simply contain an unconditional promise to pay the bearer, or A. B. or bearer, or A. B. or order (*i*). Even if not in this simple form they may be negotiable by the custom of merchants in this country, although they are not promissory notes (*k*), but it has not yet been decided that this custom will be judicially recognised in any particular case without proof (*l*). Debentures which are not negotiable are choses in action, and are therefore *primâ facie* assignable only subject to all equities between the company and the original and all intermediate holders (*m*). In order to avoid the difficulties which arise from this rule, it is now usual to introduce into debentures a provision that they shall be assignable free from, or that the principal money and interest will be paid without regard to any such equities; if this be done, the company will be precluded from setting up such equities

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(*f*) As in *Ex parte City Bank*, 3 Ch. 758.

(*g*) See, as to the modern forms of debentures and debenture stock, Palmer's Company Precedents (8th ed.), Part III.

(*h*) As in *Farmer v. Goy & Co.* [1900], 2 Ch. 149.

(*i*) Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), §§ 83 & 91; *Ex parte Colborne and Strawbridge*, 11 Eq. 478; *Ex parte City Bank*, 3 Ch. 758; and see *British India Steam Nav. Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; and *Brown, Shipley & Co. v. Commissioners of Inland Revenue* [1895], 2 Q. B. 598.

(*k*) *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.* [1898], 2 Q. B. 658; *Rumball v. Metro-*

politan Bank, 2 Q. B. D. 194 (scrip certificates of English company); *Goodwin v. Robarts*, 1 App. Cas. 476 (scrip certificates of foreign loan); *London Joint Stock Bank v. Simmons* [1892], A. C. 201 (bonds of a foreign bank); *Venables v. Baring Bros.* [1892], 3 Ch. 527; and *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120 (bonds or debentures of a foreign company). *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 375, has been overruled, see [1898], 2 Q. B. 658.

(*l*) See *ante*, p. 285. The custom must be a custom in this country, see *Picker v. London and County Banking Co.*, 18 Q. B. D. 515.

(*m*) *Ante*, p. 236 and p. 298, and the cases of set-off noticed *infra*, Bk. IV. c. 1, § 12 (3).

Bk. II. Chap. 5. against a *bonâ fide* purchaser for value without notice (n).
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Moreover, the company cannot, even after it has gone into liquidation, refuse to register the transfer of a debenture, which contains such words, to a purchaser for value without notice in order to retain an equity, such as a right of set-off, against the transferor (o).

Series of
debentures.

It is usual, where a series of debentures is issued, to issue them subject to certain terms common to the whole series. So far as such terms are for the common benefit of all the holders of debentures of the series, every holder may insist upon his rights thereunder, not only as between himself and the company, but also as between himself and the holders of the other debentures of the series (p).

Debentures, whether negotiable or not, are choses in action within the meaning of the Bankruptcy Acts, and are, therefore, not within the reputed ownership clause (q).

Trust deeds.

The holders of debentures are very frequently entitled to the benefit of a covering or trust deed, as well as to the security conferred by the debentures themselves. The trust deed usually conveys or charges property of the company to or in favour of trustees for the purpose of securing the payment of the principal money and interest raised by the debentures, and contains many elaborate provisions for the benefit of the debenture-holders, and also of the company until the security becomes enforceable (r).

(n) *Farmer v. Goy & Co., Ltd.*, [1900], 2 Ch. 149; *Ex parte New Zealand Banking Corp.*, 3 Eq. 154; *Ex parte Asiatic Banking Corp.*, 2 Ch. 391. Qu. whether such words are necessary if the debenture is payable to bearer or order. Compare *Ex parte City Bank*, 3 Ch. 758; *Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478, with *Claim of the Financial Corporation*, 3 Ch. 355.

(o) *Farmer v. Goy & Co., Ltd.* [1900], 2 Ch. 149; a judgment had also been obtained in a debenture-holder's action. See further as to rights of set-off in such cases, Bk. IV.

c. 1, § 12 (3).

(p) See, as to the common *pari passu* clause, *infra*, p. 326; as to powers given to majorities, *infra*, p. 329; and as to the clause that debentures are assignable free from equities, *Farmer v. Goy & Co., Ltd.* [1900], 2 Ch. 149.

(q) *Ex parte Rensburg*, 4 Ch. D. 685.

(r) For forms of Trust deeds the reader is referred to Palmer's *Company Precedents* (8th ed.), Part III. As to solicitor's charges for preparing them see *In re Bircham* [1895], 2 Ch. 786.

The debentures usually refer to the trust deed, and state that the holders will have the benefit of it. Such a statement, if sufficiently definite, will amount to a contract to give the debenture-holders such a security as is comprised in the trust deed, and entitles them to an equitable charge on the property mentioned in the document referred to, even though that document has in fact never been executed or is invalid (s).

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In the case of debenture stock issued by companies governed by the Companies Act, 1862, there is usually no direct contract between the company and the stock-holders. A contract for the payment of the whole sum intended to be raised or secured, which is called "the stock," and the interest thereon is entered into with trustees for the benefit of the persons ultimately entitled to the stock in proportion to the amount of stock held by them (t). The contract with the trustees is usually contained in or accompanied by a trust deed, of a nature similar to that which often accompanies debentures (u), and stock certificates are issued under the company's seal to the various stock-holders stating the amount of stock to which they are entitled. Such certificates usually refer to the trust deed, and are sometimes made out to bearer (x). In other respects the rights and remedies of the holders of debentures and of debenture stock are similar; and, speaking generally, the observations which follow are equally applicable to both classes of securities.

Debenture
stock.

Debentures and debenture stock issued by companies governed by the Companies Acts are commonly called perpetual when the principal moneys only become payable on certain contingencies which may never happen, such as the winding up of the company, the interest being in arrear for more than a

Perpetual
debentures and
debenture stock.

(s) *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; *Brown, Shipley & Co. v. Commissioners of Inland Revenue* [1895], 2 Q. B. 598, reversing ib. 240. Compare *Jenkinson v. Brandley Mining Co.*, 19 Q. B. D. 568, where the deed in question was held not to be sufficiently identified by the reference in the debenture.

(t) This confers upon the stock-holders a right to sue in equity if the trustees decline to sue. See *Gandy v. Gandy*, 30 Ch. D. 57.

(u) See Forms in *Palmer's Company Precedents* (8th ed.), Part III.

(x) As to the negotiability of such certificates see cases *ante*, note (k).

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5. certain time or, in the event of the company giving a notice to pay them off, a notice which it frequently has an option to give after a certain date. In these cases there is no borrowing or loan of money in the usual sense, for the company may never become liable to repay, and the person who advances the money may never become entitled to receive back the principal sum advanced (y). Securities in this form are open to several objections, when, as is almost invariably the case, they contain a charge on some or all of the company's property. If they create a fixed charge upon any part of the company's property it is doubtful whether they do not infringe the law against perpetuities, but this objection would not seem to apply if the only charge is a floating one (z). It is also objected to them that, apart from statute and certain special cases, such as the creation of a perpetual rentcharge, an irredeemable charge is unknown to, and not allowed by, the English law. In consequence of these objections, it is believed that such securities are now seldom created, though doubtless a considerable number are in existence (a).

The debenture stock now under discussion must not be confounded with debenture stock issued under the Companies Clauses Act, 1863; such stock is a statutory creation (b)

2. *Of the Power to issue Debentures and Debenture Stock.*

Power to issue
debentures and
debenture stock.

If a company intends to issue debentures or debenture stock an express power to do so is usually inserted in its memorandum of association; but if the original constitution of the company does not authorise such an issue, the necessary powers may in a proper case be obtained by altering the memorandum of association, or deed of settlement, as the case may be, under the

(y) See per Rigby, L. J., *City of London Brewery v. Inland Revenue Commissioners* [1899], 1 Q. B. 138.

(z) See the nature of a floating charge explained *infra*, p. 317 *et seq.*

(a) The reader will find this question more fully discussed by Mr. Palmer in Part III of his *Precedents* (8th ed.), pp. 44 *et seq.* and 93.

Compare Buckley (7th ed.), p. 194. But note that no objection to the validity of such securities was raised or hinted at in the case cited in note (y); the only question in that case was the amount of stamp duty payable on the trust deed for securing the stock.

(b) See *infra*, p. 343 *et seq.*

provisions of the Companies (Memorandum of Association) Act, 1890 (c). Moreover, it is conceived that a trading company which has a general power of borrowing, either express or implied, has by implication a power to borrow on the security of debentures of an ordinary character; but it is thought that such a power would not authorise the issue of so-called perpetual debentures or debenture stock (d).

An express power to issue debentures or debenture stock is generally expressed in terms wide enough to include transactions which might not, strictly speaking, be covered by a power to borrow or raise money by means of them. Very frequently debentures are issued in payment for property or for services; and though such an issue might be supported under a power to borrow if there was an actual debt due from the company to the vendor, or the person who has rendered the services (e), it is apprehended that it could not be supported if there was no such debt. It is a common practice when a man, as it is sometimes expressed, "converts his business into a limited company" for him to take a part of the purchase money in debentures which contain a charge upon the whole of the company's assets, and thus to obtain priority over the future creditors of the company in which he is substantially the only shareholder. However objectionable this may be, the debentures so issued are valid, even in his hands, if the company has the power to issue them for the purchase of his business (f).

As to debentures issued under the Mortgage Debenture Acts, see *infra*, pp. 346, 347.

3. *Of the Issue of Debentures and Debenture Stock and Matters connected therewith.*

The conditions which the Companies Act, 1900, requires to be fulfilled when there is an invitation to the public to subscribe for shares, before a company registered after the 31st November, 1900, can exercise any borrowing powers and

(c) *Government Stock Investment Co.* (No. 2) [1892], 1 Ch. 597; *Reversionary Interest Society* (No. 1) [1892], 1 Ch. 615. See as to this Act *infra*, pp. 456 *et seq.*

(d) See *ante*, pp. 303, 304.

(e) See *ante*, p. 291.

(f) *Salomon & Co. v. Salomon* [1897], A. C. 22, noticed *ante*, p. 160.

Matters connected with the issue of debentures.

Bk. II. Chap. 5. the consequences of not observing the statutory requirements
 Sect. 4. — in these respects, have been already discussed (*g*). It is only
 Restrictions in necessary to add that the Companies Act, 1900, does not
 exercise of borrowing powers under prevent the simultaneous offer for subscription of shares and
 Companies Act, debentures or the receipt of any application for them (*h*), and
 1900. to remind the reader that any contract to take or allot debentures is provisional until the date at which the company is entitled to commence business and exercise its borrowing powers has arrived (*i*).

Prospectuses relating to, and contracts to take, debentures.

The law, which has already been discussed relating to prospectuses, which invite the public to subscribe for or to purchase shares (*k*), and to contracts to take and allot shares (*l*), is, speaking generally, equally applicable to prospectuses which invite the public to subscribe for or to purchase debentures or debenture stock, and to contracts to take and allot debentures and debenture stock.

Remedies for breach of contract.

There is, however, this important difference between contracts to take and allot shares and contracts to take and allot debentures and debenture stock, viz., that the Courts will order the specific performance of a contract to take or allot shares, but will not order the specific performance of a contract to take or, except in certain cases about to be mentioned, to allot debentures or debenture stock. Except in such cases, a contract to take or allot debentures or debenture stock is merely a contract to lend or borrow money on the security of debentures or debenture stock, and the Courts do not order the specific performance of contracts to lend or borrow money; the legal remedy in damages is considered sufficient (*m*). If, therefore, a person has agreed to take debentures or debenture stock, and has paid some instalments

Damages.

(*g*) Companies Act, 1900, § 6, *ante*, p. 209, and p. 230.

(*h*) Companies Act, 1900, § 6 (4).

(*i*) *Ib.* § 6 (3).

(*k*) See Directors Liability Act, 1890, § 3; Companies Act, 1900, § 30, and *ante*, pp. 44 *et seq.*, and pp. 86 *et seq.* The repealed § 38 of the Companies Act, 1867, only related to prospectuses offering shares.

(*l*) *Ante*, p. 15 *et seq.* Sections 4 and 7 of the Companies Act, 1900, relating to the allotment of shares, and § 8, relating to commissions for underwriting shares, do not apply to debentures or debenture stock.

(*m*) *Western Wagon Co. v. West* [1892], 1 Ch. 271; *South African Territories v. Wallington* [1897], 1 Q. B. 692, affirmed [1898] A. C. 309.

in respect of them, he cannot be compelled to pay any further instalments; if he declines to do so the company's remedy is in damages. The measure of damages is not the amount of the unpaid instalments, but is the loss actually sustained by the breach of contract; this loss is not necessarily nominal, though it may be very difficult for the company to prove substantial damages. It is obvious that the amount of the unpaid instalments cannot be the measure of damages when it is remembered that the company is liable to repay the money which it borrows on debentures, but is not liable to repay the money which it recovers by way of damages (n).

But though the Courts will not order the specific performance of a contract to allot debentures or debenture stock, when to do so would be to enforce a contract of loan, it will order a company, which has borrowed and received money under an agreement to give debentures or other security for its repayment, to give the security promised if the terms of the security are sufficiently described in the agreement. In such cases the persons who have advanced the money are entitled in equity to the same rights as they would have been entitled to if the debentures or other security had been given to them in pursuance of the agreement (o). If, therefore, a company creates a series of debentures, the holders of which are entitled to rank *pari passu*, persons who have advanced money to the company under an agreement that the company shall issue debentures of that series to them, are entitled to rank *pari passu* with the legal holders of the other debentures of the same series (p).

The office of a prospectus which offers debentures for subscription is to invite persons to enter into a contract with the company by subscribing for the debentures offered; when

(n) *Western Wagon Co. v. West* [1892], 1 Ch. 277.

(o) *The Strand Music Hall Co.*, 3 D. G. J. & Sm. 147; *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; *Brown, Shipley & Co. v. Commissioners of Inland Revenue* [1895], 2 Q. B. 598, reversing *ib.* 240; *Simultaneous Colour Printing Syndi-*

cate v. Foweraker [1901], 1 K. B. 77; and cases in the next note; and 3 Seton, 6th ed., p. 2026.

(p) *Pegge v. Neath and District Tram. Co., Ltd.* [1898], 1 Ch. 183; and *Davis v. Martin* [1894], 3 Ch. 181, where debentures had in fact been issued, but being in blank were invalid at law.

Bk. II. Chap. 5. the debentures have been subscribed for and taken, the terms
Sect. 4.

- of the contract so entered into are to be found in the debentures, and the prospectus cannot be looked at for the purpose of construing the debentures (*q*).

Debentures
where issued.

Although the affixing of the common seal of a corporation to a deed is, generally speaking, tantamount to delivery (*r*), the mere sealing of a debenture does not necessarily amount to an issue of it; there must be a delivery or its equivalent (*s*).

Thus it was held that there had been no issue or delivery of the debentures under the following circumstances. Debentures were sealed and placed in a box, and were subsequently handed to a third person for the purpose of being issued to the public; he, having failed to issue them, returned them to two of the directors on behalf of the company, and one of these directors, without any authority from the company, distributed them to creditors of his own (*t*).

Issue at a
discount.
Validity of
debentures.

Debentures may be issued at a discount (*u*).

The principles upon which the validity of securities issued by a company depend have been already discussed (*x*); to what has been already said on this subject it is only necessary to add that the validity of debentures given by way of renewal of former debentures or in lieu of bills or bonds of the company previously issued, depends on the validity of such former instruments (*y*).

(*q*) *Chicago, &c., Co.* [1898], 1 Ch. 263, where the construction of a clause under which debentures were redeemable by means of a sinking fund within a certain period was considered. *Sed vide Crown Bank*, 44 Ch. D. 634, p. 645, where a prospectus was looked at to assist in the construction of a memorandum of association.

(*r*) *Grant on Corporations*, p. 63; *Gartside v. Silkstone, &c., Iron Co.*, 21 Ch. D. p. 768; and *ante*, p. 245, note (*z*).

(*s*) *Mowatt v. Castle Steel, &c., Co.*, 34 Ch. D. 58.

(*t*) *Mowatt v. Castle Steel, &c., Co.*,

34 Ch. D. 58. *Qu.*: Did not Cotton, L. J., overlook the rule that a deed by a corporation needs no actual delivery? See his remarks on p. 62.

(*u*) *Campbell's case*, 4 Ch. D. 470; *Anglo-Danubian, &c., Co.*, 20 Eq. 339; and, under the Companies Clauses Act, *Webb v. Shropshire Rail. Co.* [1893], 3 Ch. 307.

(*x*) *Ante*, pp. 218 *et seq.*, pp. 284 *et seq.*, and p. 298.

(*y*) See *Fountain v. Carmarthen Rail. Co.*, 5 Eq. 316. Compare *Irvine v. Union Bank of Australia*, 2 App. Ca. 366.

4. *Of Stamps and Registration.*a) *Stamps.*Bk. II. Chap. 5.
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Stamps.

Whenever a company proposes to issue any loan capital—an expression which it is apprehended would apply to an issue of a series of debentures or debenture stock by a company registered under the Companies Acts—it must, before so doing, deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue; the statement is chargeable with an *ad valorem* stamp duty of 2s. 6d. for every 100l. proposed to be secured, but this duty is not charged on the statement to the extent to which the stamp duty payable in respect of a mortgage or marketable security has been paid on any trust deed or other document securing the loan capital proposed to be issued (z).

A debenture which contains an unconditional promise to pay, and is in effect a promissory note (a), must nevertheless be stamped as a debenture (b); if, however, a debenture contains, or confers upon the holder, the benefit of any charge, it will in all ordinary cases be a marketable security (c), and must be stamped accordingly (d). A marketable security not transferable by delivery requires the same *ad valorem* stamp as a mortgage; if transferable by delivery it requires an *ad valorem* stamp of 1s. for every 10l. (e).

Debentures which are only redeemable at a premium are liable to stamp duty on the amount of the principal and the premium (f).

A trust deed to secure an issue of debentures is considered by the revenue authorities to be chargeable with a deed stamp of 10s., and not as a collateral security (g).

(z) Finance Act, 1899, 62 & 63 Vict. c. 9, § 8.

(a) *Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478; *Ex parte City Bank*, 3 Ch. 758.

(b) *British India, &c., Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; and schedule to Stamp Act, 1891, 54 & 55 Vict. c. 39.

(c) 54 & 55 Vict. c. 39, § 82, and schedule.

(d) *Brown, Shipley & Co. v. Com-*

missioners of Inland Revenue [1895], 2 Q. B. 598.

(e) 54 & 55 Vict. c. 39, schedule, and Customs and Inland Revenue Act, 1893, 56 Vict. c. 7, § 3. Debentures to bearer, if they contain a charge, therefore require the higher stamp.

(f) *Rowell v. Commissioners of Inland Revenue* [1897], 2 Q. B. 194.

(g) *Alpe's Law of Stamp Duties*, 4th ed., p. 193. *Palmer's Company Precedents*, 8th ed., Part III., p. 180.

Bk. II. Chap. 5. A trust deed to secure an issue of debenture stock requires
Sect. 4. an *ad valorem* stamp of 2s. 6d. for every 100l. (h).

Debenture stock.

A debenture stock certificate to bearer requires a stamp of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the stock if the consideration for the transfer were the nominal value of the stock (i). A debenture stock certificate to registered holder does not require a stamp when the stock is secured by a trust deed (k).

Letters of allotment and remuneration.

Letters of allotment and letters of renunciation of debentures or debenture stock require a 6d. stamp where they relate to an amount not less than 5l.; in other cases they require 1d. stamp (l).

Coupons.

Coupons for interest do not require any stamp (m).

b) Registration.

Registration under Bills of Sale Act.

Section 17 of the Bills of Sale Act, 1882, excepts from the operation of that Act any debentures issued by any mortgage loan or other incorporated company and secured upon the capital, stock, or goods, chattels, and effects of such company.

This section has given rise to great discussion (n), but its importance is greatly diminished since it has been decided that the Bills of Sale Acts do not apply to any mortgages or charges by incorporated companies which, like those governed by the Companies Clauses Consolidation Act, 1845, and the Companies Acts, are under a statutory duty to keep a register of mortgages or charges affecting their property (o). But a

(h) *City of London Brewery Co. v. Inland Revenue Commissioners* [1899], 1 Q. B. 121, in which case it was decided that this duty was payable in respect of the whole issue though part was only to be issued in redemption of prior outstanding stock.

(i) 54 & 55 Vict. c. 39, § 108, and schedule, tit. "Share Warrant, &c., and Stock Certificate," and "Conveyance or Transfer"; and 62 & 63 Vict. c. 9, § 5 (2).

(k) *Palmer, Company Precedents*, 8th ed., Part III., p. 180.

(l) 54 & 55 Vict. c. 39, schedule,

and 62 & 63 Vict. c. 9, § 9.

(m) 54 & 55 Vict. c. 39, schedule, tit. "Bill of Exchange" Exemption (11), and Finance Act, 1894, 57 & 58 Vict. c. 30, § 40.

(n) *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; *Levy v. Abercorris Co.*, 37 Ch. D. 260; *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 215; and cases in the next note.

(o) *Richards v. Overseers of Kidderminster* [1896], 2 Ch. 212; *Standard Manufacturing Co.* [1891], 1 Ch. 627; and *Read v. Joannon*, 25 Q. B. D. 300; *Jenkinson v. Brandley Mining Co.*,

debenture issued by a society registered under the Industrial and Provident Societies Acts, which do not impose upon the societies governed by them the duty of keeping such a register, must, if it charges the personal chattels of the society, be registered as a bill of sale (*p*).

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All limited registered companies are required by the Companies Act, 1862, to keep a register of all mortgages and charges specifically affecting their property and to allow the register to be inspected by any creditor or member of the company at all reasonable times (*q*); but the omission to register mortgages in compliance with this section does not render them invalid, even though held by a director whose duty it is to see that the statute is complied with (*r*).

Registers of
mortgages, &c.,
under the Com-
panies Acts.

Companies Act,
1862.

These provisions are still in force, but they have been greatly extended by the provisions of the Companies Act, 1900 (*s*). That Act requires every mortgage or charge created since the 31 December, 1900, by a company registered under the Companies Acts, being either (1) a mortgage or charge for securing any issue of debentures, or (2) a mortgage or charge on uncalled capital of the company (*t*), or (3) a mortgage or charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale (*u*), or (4) a floating charge on the undertaking or property of the company, to be filed by the company with the registrar of joint stock companies (*x*) within twenty-one days after its

Companies Act,
1900.

19 Q. B. D. 568; and *Topham v. Greenside Fire Brick Co.*, 37 Ch. D. 281, are overruled on this point.

(*p*) *Gt. North. Rail. Co. v. Coal Co-operative Soc.* [1896], 1 Ch. 187.

(*q*) 25 & 26 Vict. c. 89, § 43, and *infra*, p. 314.

(*r*) *Wright v. Horton*, 12 App. Ca. 371, which finally settles this much-contested question. The earlier authorities are *General South American Co.*, 2 Ch. D. 337; *Borough of Huckney Newspaper Co.*, 3 Ch. D. 669; *North and South Wales Bank*, 10 Eq. 515; *Dublin Drapery Co.*, 13 L. R. Ir. 174. Compare *Native Iron Ore Co.*, 2 Ch. D. 345; *Ex parte*

Valpy and Chaplin, 7 Ch. 289, where the mortgages were held invalid.

(*s*) § 14. The section does not apply to companies registered in Scotland. See § 34 (2).

(*t*) As to charges on uncalled capital, see *infra*, pp. 316 *et seq.*

(*u*) As to what instruments do require registration as bills of sale, see Bills of Sale Act, 1878 (41 & 42 Vict. c. 3), §§ 4, 5, 6, and 7, and the exceptions therefrom contained in the Bills of Sale Acts, 1890 and 1891 (53 & 54 Vict. c. 53, and 54 & 55 Vict. c. 35), and Mr. Herbert Reed's book on the Bills of Sale Acts.

(*x*) As to the particulars to be

Bk. II. Chap. 5. creation (y). If it is not so filed the security thereby conferred
Sect. 4. — on the company's property or undertaking is void, but the
Effect of non- avoidance of the security does not affect any contract or
registration. obligation for the repayment of the money (z). In other words, non-compliance with the Act in this respect has the effect of turning a secured creditor into an unsecured creditor.

Certificate of registration.

The registrar is to keep a register of all such mortgages and charges (a) with a chronological index (b), and is required to give a certificate under his hand of such registration stating the amount secured. His certificate is conclusive evidence that the requirements of the Act as to registration have been complied with, and a copy of his certificate is to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the registered mortgage or charge (c).

Particulars to be registered.

The register is to contain the particulars mentioned in the section (d), which, however, are somewhat modified when a series of debentures or debenture stock containing a charge to the benefit of which the holders are entitled *pari passu* is created (e). Further, when more than one issue is made of the same series, the company may require the registrar to enter in his register the date and amount of any particular issue, but the omission to do so does not affect the validity of the security (f).

Who may register.

It is the duty of the company to register the mortgages or charges which require registration under this Act (g), and in case of default the company and every director, manager, or other officer of the company who knowingly and wilfully authorises or permits such default is without prejudice to any other liability liable to a fine (h). Any person interested in any

supplied to the registrar, see Order of Board of Trade, 28 December, 1900, Form No. 47.

(y) § 14 (1) and (7). In case of property situated abroad, see § 14 (2).

(z) See § 14 (1).

(a) As to fees payable on registration, see Order of Board of Trade as to fees, 28 December, 1900.

(b) § 17.

(c) § 14 (6), and as to penalty for delivering a debenture or certificate

of debenture stock without a copy of the registrar's certificate endorsed thereon, see § 18.

(d) § 14 (3), and see Order of Board of Trade, 28 December, 1900, Form No. 47. The registrar requires the documents to be sent. *Boottle Cold Storage, &c., Co.*, W. N. 1901, p. 54.

(e) § 14 (4).

(f) § 14 (5).

(g) § 14 (7).

(h) § 18.

such mortgage or charge has the right to apply for its registration (i). Bk. II. Chap. 5.
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The register is open to inspection by any person on payment of a small fee (k). Inspection of
register.

The registrar may, on being satisfied that the debt for which the registered mortgage or charge was given has been paid, enter a memorandum to that effect in the register (l). Memorandum of
satisfaction.

In addition to the registration of such mortgages or charges with the registrar, the company is required to keep a copy of every instrument requiring registration under these provisions of the Act at its registered office, but in the case of a series of uniform debentures it is sufficient if a copy of one such debenture is kept; such copies are to be open to inspection by the members and creditors of the company on payment of a small fee (m). Copies of mort-
gages, &c., to
be kept by
company.

A judge of the High Court, on being satisfied that any omission to register a mortgage or charge within the time required by the Act, or any omission or misstatement of any particular with respect to any such mortgage or charge was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or that the omission or misstatement be rectified (n). Rectification of
register and
extension of
time.

In the absence of special circumstances, an order extending the time for registration will be expressed to be without prejudice to the rights of parties acquired prior to the date of actual registration (nn). Order for exten-
sion of time.

The Companies Act, 1900, does not state that registration of a mortgage or charge in accordance with its provisions is to be equivalent to notice of its existence; this question can Registration as
notice.

(i) § 14 (7).

(k) § 14 (8), and as to the fee, see the Order of Board of Trade as to fees, 28 December, 1900.

(l) § 16, and Order of Board of Trade, 28 December, 1900, Form No. 49.

(m) § 14 (9), and *infra*, p. 314.

(n) § 15. For instances, see *E. & F. Beattie, Ltd.*, W. N. 1901, p. 152,

Tingri Tea Co., ib. 165, and *Boottle Cold Storage, &c., Co.*, ib. 54.

(nn) *Per* Buckley, J., in *Joplin Brewery, Ltd.*, October 29, 1901, following the practice under § 14 of the Bills of Sale Act, 1878. *Qu.*: if the Court will grant an extension of time after the company is in liquidation, see under the Bills of Sale Act, 1878, § 14, *Ex parte Furber* [1893], 2 Q. B. 123.

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only be determined by decision. It may, however, be observed, on the one hand, that registration of a deed or document under the Middlesex and Yorkshire Registry Acts was not of itself notice of such deed or document (*o*), and on the other, that there is authority in support of the proposition that persons who deal with a registered company have notice of documents registered with the registrar in pursuance of the requirements of the Companies Acts (*p*).

Liability of
directors.

Though the Act imposes penalties on any officer of the company who knowingly and wilfully authorises or permits any default in complying with the requirements of the Act in these respects, the duty to comply with the Act is expressly imposed on the company (*q*). Speaking generally, directors as agents of the company are not liable to third parties for breaches of duty to their principals (*r*). Moreover, any person interested in the security has the right to demand its registration (*rr*). It seems, therefore, that non-compliance by a director or officer will not impose on him a liability in damages towards a creditor whose security is thereby rendered invalid.

Right of inspection.

A right to inspect the register of mortgages kept under the Companies Act, 1862 (*s*), or under the Companies Clauses Act, 1863 (*t*), includes a right to take copies, and also a right to inspect by a solicitor or other agent, against whom no reasonable objection can be taken by the company (*tt*). It is apprehended that the right to inspect the copies of mortgages and charges

(*o*) *Morecock v. Dickins*, Amb. 678; *Williams v. Sorrell*, 4 Ves. 389; *Wiseman v. Westland*, 1 Y. & J. 117.

(*p*) *Irvine v. Union Bank of Australia*, 2 App. Cas. 366; *London v. New York, &c., Corp.* [1895], 2 Ch. p. 871; but see as to the reluctance of the Court to extend the rules of constructive notice in commercial matters, *London Joint Stock Bank v. Simmons* [1892], A. C. 201; *Manchester Trust v. Furness* [1895], 2 Q. B. 539, and *infra*, p. 322.

(*q*) See § 14 (7). See, too, *R. v. Tyler & International, &c., Co.* [1891], 2 Q. B. 589.

(*r*) *Lane v. Cotton*, 12 Mod. 172, and 1 Ld. Raymond, 646; *Story*

on Agency, 9th ed., p. 376; see, too, *Knowles v. Scott* [1891], 1 Ch. 717, a case as to the liability of a liquidator.

(*rr*) See § 14 (7).

(*s*) *Nelson v. Anglo-American, &c., Co.* [1897], 1 Ch. 130. This right ceases when the company is being wound up, *Somerset v. Land Securities Co. W. N.*, 1897, p. 29; *Kent Coalfields Syndicate* [1898], 1 Q. B. 754.

(*t*) *Mutter v. Eastern & Midlands Rail. Co.*, 38 Ch. D. 92, distinguished in *Balaghat Gold Mining Co.* [1901], 2 K. B. 663.

(*tt*) *Credit Co.*, 11 Ch. D. 256; *Bevan v. Webb* [1901], 2 Ch. 59; reversing *ib.* [1901], 1 Ch. 724.

which the company is required to keep by the Companies Act, 1900, may be exercised in the same manner. Bk. II. Chap. 5.
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By the Stannaries Acts all companies to which the Stannaries Act, 1887, applies are required (in addition to any other registration required by law) to register with the registrar of one of the county courts in Cornwall, within twenty-eight days of their date, all documents whereby power is given to any person to take possession of any mining effects of or in their mine (*u*). Unless registered the documents confer no priority over, or title as against, the claims of any person for work done in the mine or for goods supplied to the company by which the mine is carried on. Stannaries Acts.

5. *Of the Charges contained in Debentures, &c., and especially of floating Charges and their Priorities.*

A company may charge the whole of its property, both present and future, and modern debentures usually contain such a charge. Such a charge will include book debts (*x*), and any assets which may be recovered by the company from the directors and other officers by action or proceedings in the winding up of the company (*y*). General charges.

Property abroad may be included in the general charge (*z*), but unless the charge is recognised by the country where the property is situated, the courts in this country will not restrain proceedings by unsecured creditors in the foreign courts in order to give the debenture holders the benefit of the charge (*a*). Property abroad.

The power of a company to charge or grant a lien on its books and documents has given rise to some discussion. It seems, however, that the company can do so as to all books and documents except those which the Companies Acts, or the Companies' books.

(*u*) 50 & 51 Vict. c. 43, § 19, and 59 & 60 Vict. c. 45, § 1, and the Order of the Lord Chancellor, 16 December, 1896, printed in the Appendix.

(*x*) *Bloomer v. Union, &c., Coal Co.*, 16 Eq. 383; *Tailby v. Official Receiver*, 13 App. Ca. 523.

(*y*) *Anglo-Austrian Printing, &c., Co.* [1895], 2 Ch. 891.

(*z*) See *Perry v. Oriental Hotels Co.*, 5 Ch. 420; *Mercantile Investment*,

&c., Co. v. River Plate Co. [1892], 2 Ch. 303, and case in the next note.

(*a*) *Maudslay v. Maudslay, Sons & Field* [1900], 1 Ch. 602, which shows that for this purpose a debt may have a locality. *Liverpool Marine, &c., Co. v. Hunter*, 4 Eq. 62; *Queensland Mercantile, &c., Co.* [1892], 1 Ch. 219, affirming [1891], 1 Ch. 536 (a charge on uncalled capital, calls arrested in Scotland).

Bk. II. Chap. 5. company's articles of association, require to be kept at its
Sect. 4. registered office (b), but that general words in a mortgage or charge do not as a rule extend to them (c).

Charges on un-called capital.

Companies registered under the Companies Acts may create charges on their uncalled capital (d), but this power does not extend to capital reserved under the Companies Act, 1879, which can only be called up in the event of and for the purposes of the company being wound up (e); nor to other moneys which, forming no part of the capital, can only be called up in a winding up, *e.g.*, the moneys in excess of the nominal amount of their shares, for which shareholders in unlimited companies are liable to creditors (f). If, however, the memorandum of association, while authorising certain charges, has omitted to authorise a charge on uncalled capital, this may in some cases imply a prohibition (g). If the original constitution of the company does not authorise such a charge the memorandum of association, or deed of settlement as the case may be, may in a proper case be altered in this respect under the provisions of the Companies (Memorandum of Association) Act, 1890 (h). If the memorandum of association is silent on the point, a company which has power to borrow money may be authorised to charge its uncalled capital by its original articles of association, and, if the silence does

(b) *Capital Fire Insurance Association*, 24 Ch. D. 408; *Engel v. South Metropolitan Co.* [1892], 1 Ch. 442; *Anglo-Maltese, &c., Co.*, W. N. 1885, p. 84.

(c) *Clyde Tin Plate Co.*, 42 L. T. N. S. 439; and *Engel v. South Metropolitan Co.* [1892], 1 Ch. 442.

(d) *Newton v. Debenture Holders, &c., Co.* [1895], A. C. 244; *Pyle Works*, 44 Ch. D. 534; *Howard v. Patent Ivory, &c., Co.*, 38 Ch. D. 156; *Phoenix Bessemer Steel Co.*, 44 L. J. Ch. 683; and as to unpaid calls actually made, *Gibbs & West's case*, 10 Eq. 310; *Sankey Brook Coal Co.* (No. 2), *ib.* 381; and as to calls actually determined to be made though not made, *Sankey Brook Coal Co.* (No. 1), 9 Eq. 721.

(e) *Bartlett v. Mayfair Property Co.* [1898], 2 Ch. 28; *Pyle Works*, 44 Ch. D. p. 586; Companies Act, 1879, § 5. Compare and distinguish *Newton v. Debenture Holders, &c., Co.* [1895], A. C. 244, where the charge extended to the whole uncalled capital, though under the articles part could not be called up except under a special resolution of the company.

(f) See cases in last note.

(g) See *Newton v. Debenture Holders, &c., Co.* [1895], A. C. p. 249.

(h) *Reversionary Interest Society* (No. 1) [1892], 1 Ch. 615; *Governments Stock Investment Co.* (No. 2) [1892], 1 Ch. 597. As to this Act, see *infra*, pp. 456 *et seq.*

not imply a prohibition, the articles may, if necessary, be altered to give the power (i). Bk. II. Chap. 5.
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The power need not in terms authorise a charge on uncalled capital; if the power authorises the company to borrow "upon any security of the company, or upon the security of any property of the company" (k), or "upon the property and effects of the company, or in such other manner as the company may determine" (l), or "upon the properties and rights" (m), or "upon the property, assets, and revenues" (n) of the company, this is sufficient; but uncalled capital is not part of the property of the company, so that power to charge the "property" (o), or "the property and effects" (p), or "the funds or property" (q) of the company is not sufficient to authorise a charge on its uncalled capital. Moreover, it has been decided that charges upon "all the undertaking" (r), "the real and personal estate" (s), or "the property both present and future" (t) of the company, do not extend to uncalled capital; presumably, therefore, a power expressed in similar terms would not authorise a charge upon uncalled capital. Power to charge
uncalled capital.

A charge upon uncalled capital includes calls made in respect of capital which can be so charged (u) upon contributions by the liquidator in the winding up of the company (x). Calls in winding
up.

If, as is usually the case, the debentures contain a charge Floating charges.

(i) *Jackson v. Rainford Coal Co.* [1896], 2 Ch. 340, and see [1895], A. C. p. 248, and as to the construction of a memorandum and contemporaneous articles of association, see *ante*, p. 163.

(k) *Newton v. Debenture Holders, &c., Co.* [1895], A. C. 244.

(l) *Jackson v. Rainford Coal Co.* [1896], 2 Ch. 340.

(m) *Howard v. Patent Ivory, &c., Co.*, 38 Ch. D. 156.

(n) *Page v. International Agency, &c., Trust*, W. N. 1893, p. 32.

(o) *Bank of S. Australia v. Abrahams*, L. R. 6 P. C. 265.

(p) *Jackson v. Rainford Coal Co.* [1896], 2 Ch. p. 343; *Sankey Brook Coal Co.* (No. 2), 10 Eq. 381. These

words will include a call actually made but not paid. See 10 Eq. 381.

(q) *Stanley's case*, 4 D. J. & S. 407, in which the power to charge uncalled capital was doubted.

(r) *King v. Marshall*, 33 Beav. 565.

(s) *Ex parte Bradshaw*, 15 Ch. D. 465.

(t) *Streatham and General Estates Co.* [1897], 1 Ch. 15; *Russian Spratt's Patent, Ltd.* [1898], 2 Ch. 149.

(u) See *ante*, p. 316.

(x) *Anglo-Austrian Printing, &c., Union* [1895], 2 Ch. 891. See as to rights of the holders of debentures charging uncalled capital in the case of a conflict of law, *Queensland Mercantile, &c., Co.* [1892], 1 Ch. 219, affirming [1891], 1 Ch. 536.

Bk. II. Chap. 5. on the undertaking, or the general property of the company, the charge given is what has been called "a floating security." The nature of such a charge has been discussed in many cases (y), but is perhaps best explained in the words of Lord Macnaghten: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension he may exercise his right whenever he pleases after default" (z).

Power of company to deal with property notwithstanding a floating charge.

The power of the company to deal with its property while such a charge remains dormant may be limited by the terms of the security, but in the absence of any such limitation, and apart from any question of fraud, the company may, while the charge remains dormant, deal with its property in any way which is not *ultra vires*, and which, reasonably regarded, is in furtherance of any of the objects which the company was established to carry out, and is not inconsistent with its continuance as a going concern. In many, if not in most cases, the power of the company to deal with its property during the dormancy of the charge is expressed in more limited terms, and is spoken of as confined to dealings in the ordinary course of the company's business (a); but in the absence of words to that effect in the debentures, such a

(y) See *Panama, &c., Mail. Co.*, 5 Ch. 318; *Marine Mansions Co.*, 4 Eq. 601; *Gardner v. Lond., Chatham, and Dover Rail.*, 2 Ch. 201; *Ex parte Moor*, 10 Ch. D. 530; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681; *Hodson v. Tea Company*, 14 Ch. D. 859; *Ex parte Bradshaw*, 15 Ch. D. 465; *Willmott v. London Celluloid Co.*, 34 Ch. D. 147; and cases in the following notes. The charge in *New Clydach, &c., Co.*, 6 Eq. 514, was held not to extend to future property, *sed*

quere.

(z) *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. p. 86; *Metropolitan Bank, &c., Ltd. v. H. H. Vivian & Co.* [1900], 2 Ch. p. 657; *Foster v. Borax Co.*, [1901] 1 Ch. 326; reversing [1899], 2 Ch. 130.

(a) See, for instance, *Ex parte Moor*, 10 Ch. D. 530; *Wheatley v. Silkstone, &c., Co.*, 29 Ch. D. 715; *Willmott v. London Celluloid Co.*, 34 Ch. D. 147; *Driver v. Broad* [1893], 1 Ch. 574; *Wallace v. Evershed* [1899], 1 Ch. 891.

limitation seems to confine the power within too narrow limits, and to be inconsistent with the two most recent decisions, viz., *Metropolitan Bank of England and Wales v. H. H. Vivian & Co.* (b) and *Foster v. Borax Co.* (c), unless indeed the expression "the ordinary course of the company's business" is interpreted in a wide sense and held to include any transaction which, fairly considered, is in furtherance of any of the company's objects, and is not inconsistent with its continuance as a going concern. In the former of these cases (b) a company which carried on business at three branches was held to be entitled to sell one entire branch of its business to another company in exchange for shares, and an application by the debenture holders to restrain the sale was dismissed. In the latter case (c) a company which was formed primarily to carry on business as dealers in borax, but had power under its memorandum of association to sell its undertaking to and amalgamate with any other company having similar objects, was held entitled to sell the whole of its business, goodwill, and assets, with the exception of certain securities, in exchange for shares and debentures in a new company, which was to be formed to carry on the borax business. The agreement for sale expressly provided that the original company was not to carry on any business in borax after the completion of the sale, consequently after completion the company would have no business in the ordinary sense to carry on, but would merely be the holder of the securities, excepted from the sale, and of the shares and debentures in the new company. The Court of Appeal, however, held that having regard to the company's memorandum of association the transaction and the holding of such shares and debentures was one of the objects of the company, so that a petition to wind up the company on the ground that it had become impossible for it to continue its undertaking must have been dismissed (d), and that, therefore, it continued to be a going concern, and

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Metropolitan
Bank of
England and
Wales v.
H. H. Vivian
& Co.

Foster v. Borax
Co.

(b) [1900], 2 Ch. 654.

(c) [1901], 1 Ch. 326, overruling [1899], 2 Ch. 130; but see *Hubbuck v. Helms*, 56 L. J. Ch. 536.

(d) As to this see *infra*, Bk. IV.,

c. 1, § 4. *Semble*, Vaughan-Williams, J., would have decided otherwise had he not held that the Court of Appeal were bound by the finding of the Court below that the company

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not matured were not entitled to an injunction to restrain the sale. This case certainly goes a long way towards destroying the value of a floating charge upon the undertaking of any company which has a power to sell its business to another company for shares. For if that company exercises the power, the purchasing company may have already issued debentures, or can subsequently issue debentures, with a charge on its assets which will rank in priority to the rights of its shareholders, and consequently to the debenture holders of the selling company, who, by reason of the sale, would then be secured upon the shares in the purchasing company held by the selling company. Probably in future some words limiting the company's power to carry out such a transaction as that in question will be introduced into debentures (e).

Creation of mortgages and charges with priority over floating charge.

The company which has granted a floating charge on its property or assets in general terms and without any express restriction on its power in this respect (f), may, while the floating charge continues dormant, grant mortgages or charges upon any specific part of its property or assets, and any person to whom such a security is given will have priority in respect of the specific property comprised in his security over the debenture holders, notwithstanding that his security is merely equitable, and that he took with notice of the floating charge (g), and that the floating charge is expressly stated to be a first charge (h). Moreover, the company can give priority over a prior floating charge to a second series of debentures in respect of property specifically mortgaged to secure them (i), though, in the absence of an express power, it cannot give them a floating charge with priority over or ranking *pari passu* with the floating charge of the first series (k). In practice it

had not ceased to carry on business, a finding against which there was no appeal. See [1901], 1 Ch. p. 342.

(e) As to words imposing limits on the company's power, see *infra*, pp. 321 *et seq.*

(f) Where there is a restriction, see *infra*, pp. 321 *et seq.*

(g) *Ex parte Pitman and Edwards*,

12 Ch. D. 707; *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81.

(h) *Wheatley v. Silkstone, &c., Co.*, 29 Ch. D. 715.

(i) *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81.

(k) *Smith v. English and Scotch, &c., Trust*, W. N. 1896, p. 86.

is not uncommon for a company to issue two or more series of debentures or debenture stock of which the first series is secured by a first fixed mortgage on certain specific property of the company, and a first floating charge on the remainder of its property; and the second series is secured by a first fixed mortgage on other specific property, and a floating charge subject to the charge of the first series on the remainder of its property and so on, with any subsequent series.

A company may, while the floating charge continues dormant, pay debts owing by it, get in debts owing to it, and make any ordinary arrangement with its creditors without the assent of the debenture holders, who have no right to interfere in such matters (*l*). The existence of a floating charge and notice of it will not prevent a creditor of the company from setting off a debt due to him from the company against a debt due from him to the company, and if both debts were in existence before the floating charge ceased to be dormant the set off may be made after the debenture holders have intervened and obtained the appointment of a recorder (*m*). So again a landlord may, while the debentures continue to be a floating security, distress for rent due to him from the company even under a lease granted after the issue of the debentures, and though the distress is levied under a power contained in a mining lease upon chattels which are not upon the demised property (*n*).

Very frequently the power of the company to deal with its property while the floating charge thereon continues dormant is limited by the terms of the debentures or other securities which create the charge. When this is the case the company will be bound by those terms, and the persons entitled to the debentures or other securities may, in a proper case, obtain an injunction to restrain the company from acting in contravention of them. The usual limitation imposed is one which prohibits the company from creating any mortgage or charge,

Other dealings with company's property which have priority over, or are unfettered by, floating charge. Payment of debts.

Set off;

Distress for rent.

Express restrictions on company's power to deal with property subject to a floating charge. In what cases effective.

(*l*) *Willmott v. London Celluloid Co.*, 34 Ch. D. 147; *Robson v. Smith* [1895], 2 Ch. 118; *Biggerstaff v. Rowatt's Wharf, Ltd.* [1896], 2 Ch. 93. (*n*) *Lee v. Roundwood Colliery Co.* [1897], 1 Ch. 373. Compare position of execution creditors, noticed *infra*, p. 324.

Bk. II. Chap. 5. either generally or on some specified portion of its property,
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in priority to or ranking *pari passu* with the debentures containing the charge. If any person takes a mortgage or charge from the company with notice of the debentures and of the prohibition therein he will take subject to the charge except in a few exceptional cases, where by statute a formal mortgage takes priority over an equitable charge (o). But if for valuable consideration he takes a mortgage or charge on any specific property of the company without notice of the prohibition, he will have priority in respect of such property over the floating charge if his mortgage be legal (p), or if, being equitable, he obtains the title deeds (q). The fact that he knows of the existence of the debentures will not necessarily give him notice of the prohibition therein; the debentures may or may not contain a prohibition which affects his mortgage; and if he is told by persons acting on behalf of the company that the debentures do not affect his mortgage he will not be fixed with notice of the prohibition (r). Such at least was the law before the passing of the Companies Act, 1900, and it is conceived that that Act has not altered the law in this respect. For even if registration with the registrar of joint stock companies is notice of the charge registered (s), the terms of the debenture now under consideration are not included in the particulars which the registrar is required to enter on the register of charges kept by him, and the form of debenture which the Act requires to be kept at the company's office is only open to inspection by members and creditors on payment of a fee (t). The person advancing the money would generally not be a creditor until after his mortgage was completed. Even if he were a creditor or member of the company it is thought that

(o) *E.g.*, under the Merchant Shipping Act, 1894, and the earlier

Acts, a person entitled to a legal mortgage on a ship in statutory form and duly registered is entitled to priority over an earlier equitable charge, notwithstanding notice. *Black v. Williams* [1895], 1 Ch. 409.

(p) *English, &c., Investment Co. v. Brunton* [1892], 2 Q. B. 701.

(q) *Roper v. Castell & Brown, Ltd.*

[1898], 1 Ch. 315.

(r) See case in note (p); *Le Neve v. Le Neve*, 1 Amb. 436, and 2 White and Tudor's Leading Cases, 6th ed., pp. 26 and 56; and *Jones v. Smith*, 1 Ha. 43, and 1 Ph. 244.

(s) As to this see *ante*, pp. 313, 314.

(t) See Companies Act, 1900, § 14 (4) and (9), and the order of the Board of Trade, 28 Dec., 1900, form No. 47.

the provisions of the Act will not be held to fix him with notice of the terms of the debentures (u). Bk. II. Chap. 5.
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Words prohibiting the company from creating a charge in priority to the floating charge are to be read strictly (x). Such a prohibition will not prevent the solicitor of the company from acquiring a lien on the company's documents for costs incurred while the floating charge continued dormant (y), nor will it prevent a landlord from distraining for rent under a lease granted after the debentures were issued (z), nor will it entitle the debenture holders during the dormancy of the charge to prevent a creditor of the company from attaching a debt due to the company under a garnishee order, and receiving payment from the debtor (a). In what cases not effective.

A floating charge, nevertheless, is an existing charge, even while it continues dormant. Thus, if debentures contain a floating charge upon the whole of the company's property, and part of that property consists of land, a contract for the sale of the debentures is a contract for the sale of an interest in land within the 4th section of the Statute of Frauds (b); and it has been held that if the charge is expressed to be a floating charge until default in payment, a purchaser of the land subject to the floating charge is entitled to reasonable evidence that there has been no such default (c). The fact that a floating charge is an existing charge becomes of great importance in transactions falling outside the class of acts which a charge in this form impliedly authorises the company Floating charge is an existing charge.
Statute of Frauds.
Vendor and purchaser.

(u) The editor is not aware of any case in which registration under § 43 of the Companies Act, 1862, has been held to be equivalent to notice. And see, as to the danger of extending the equitable doctrine of constructive notice in commercial transactions, *London Joint Stock Bank v. Simmons* [1892], A. C. 201; *Manchester Trust v. Furness* [1895], 2 Q. B. 539.

(x) *Robson v. Smith* [1895], 2 Ch. 118. law, and is incidental to the employment of a solicitor.

(y) *Lee v. Roundwood Colliery Co.* [1897], 1 Ch. 373, *ante*, p. 323.

(z) *Robson v. Smith* [1895], 2 Ch. 118.

(a) *Driver v. Broad* [1893], 1 Q. B. 744, affirming *ib.* 539. This is not the case with debenture stock issued under the Companies Clauses Act, see *Attree v. Have*, 9 Ch. D. 337, a decision under the Mortmain Acts.

(b) *Horne and Hellard*, 29 Ch. D. 736. *Sed quere* if this case would be followed now, see *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81.

(c) *Brunton v. Electrical Engineering Corp.* [1892], 1 Ch. 434. Such a lien is a right given by the general

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Foreclosure
actions.

Execution
creditors.

Garnishee
orders.

to do ; in such transactions the claims of the debenture holders cannot be disregarded. Thus, if a prior mortgagee commences an action for foreclosure, the holders of debentures which contain a floating charge on the mortgaged property are necessary parties to the action, for the working out of a foreclosure decree is not a dealing by the company with its property in the course of its business (*d*). So, too, the rights of debenture holders (*e*), while their charge continues dormant, prevail over those of an execution creditor, at all events, if they assert their rights before the sheriff has sold (*f*). The decisions which establish the priority of debenture holders over execution creditors appear to be based on the following reasoning : an execution creditor has no greater right in goods seized than the debtor himself has ; a seizure cannot affect the rights of third parties in the goods unless they have in some way debarred themselves from asserting their rights ; a person who takes a floating charge on a company's property only authorises the company to deal with its property in the course of its business ; an execution is a compulsory process against the property of the company, and is not a dealing by the company with its property, nor is the right to issue execution a right conferred by the company (*g*) ; consequently there is nothing in the nature of a floating charge to debar those entitled to it from asserting their charge against an execution creditor. It has, however, been decided that a creditor of a company may, under a garnishee order, attach a debt due to it, notwithstanding the existence of a floating charge and the intervention of those entitled to the charge (*h*). It is difficult

(*d*) *Wallace v. Evershed* [1899], 1 Ch. 891.

(*e*) Including persons to whom the company is bound to issue debentures, *Simultaneous Colour, &c., Syndicate v. Foweraker* [1901], 1 Q. B. 771, and *ante*, p. 307 ; and *bond fide* holders for value of debentures irregularly issued. *Duck v. Tower Galvanizing Co.* [1901], 2 K. B. 314.

(*f*) *Davey & Co. v. Williamson & Sons, Ltd.* [1898], 2 Q. B. 194 ;

Taunton v. Sheriff of Warwickshire [1895], 2 Ch. 319 ; *Opera, Ltd.* [1891], 3 Ch. 260 ; *Standard Manufacturing Co.* [1891], 1 Ch. 627.

(*g*) See [1897], 1 Ch. pp. 393, 394 ; hence the distinction between a creditor's execution and a landlord's right to distrain. The latter right is expressly or impliedly conferred by the lease.

(*h*) *Robson v. Smith* [1895], 2 Ch. 118 ; and *Willmott v. London Celluloid Co.*, 34 Ch. D. 147.

to reconcile these decisions with the principle on which priority is denied to execution creditors. Bk. II. Chap. 5.
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The existence of an equitable charge on goods does not protect them from distress for rates levied by the overseers of the poor; hence a distress for such rates upon the company's goods will prevail over the general charge contained in the debentures even after the debenture holders have obtained the appointment of a receiver and manager, if the company is still in occupation of the premises in respect of which the rate is due (i). Distress for
poor rates.

From the foregoing observations the importance of ascertaining the moment when a floating charge ceases to be dormant and becomes fixed is very apparent. Apart from any special bargain between the company and the debenture holders a floating charge becomes fixed when the company ceases to carry on business (k), upon the commencement of the winding up of the company (l), or upon the appointment of a receiver (m). But until one of these events happens the charge will not become fixed. Thus it has been held that the charge retains its character as a floating security although the company is in difficulties (n), although the principal moneys and interest are in arrear and the debenture holders are entitled to intervene (o), although the debenture holders The events on
which floating
charges become
fixed.

(i) *Marriage, Neave & Co.* [1896], 2 Ch. 663; compare *Richards v. Overseers of Kidderminster* [1896], 2 Ch. 212, in which case there was an actual assignment of the goods. The dicta in this case that an equitable charge is effective against a distress for poor rates are not law. See, too, if the company is being wound up or a receiver has been appointed or possession taken by the debenture holders, the Preferential Payment in Bankruptcy Act, 1888, and the Amendment Act, 1897, noticed *infra*, Bk. IV., c. 1, § 12. 2.; and as to Ireland, 52 & 53 Vict. c. 60, § 4, and 60 & 61 Vict. c. 19.

(k) *Robson v. Smith* [1895], 2 Ch. 118; *Foster v. Borax Co.* [1901], 1 Ch. 326; *Metropolitan Bank, &c. v. H. H. Vivian & Co.* [1900], 2 Ch.

654; *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81.

(l) See cases in last note; *Lee v. Roundwood Colliery Co.* [1897], 1 Ch. 373; *Wallace v. Universal Automatic, &c., Co.* [1894], 2 Ch. 547, which seems to show that to some extent the charge may be treated as floating even after the winding up has commenced if the debenture holders do not intervene. As to the date of the commencement of the winding up, see *infra*, Bk. IV., c. 1, § 6.

(m) See cases in note (k).

(n) *Robson v. Smith* [1895], 2 Ch. 118.

(o) *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81. Notice the peculiar wording of the debentures in this case. Compare *Horne and Hellard*, 26 Ch. D. 736.

Bk. II. Chap. 5. have recovered judgment for the principal moneys and interest
 Sect. 4. ——— and have issued execution thereunder (*p*), and although an
 action for the appointment of a receiver has been commenced
 if no receiver has been effectively appointed (*q*).

If the debenture holders wish to provide that the floating charge shall become fixed and binding before the happening of any of the three events above mentioned, they can doubtless do so by express bargain with the company, but the inconvenience would be so great that the bargain must be in very explicit terms (*r*).

6. Of the Priorities and Rights of the Holders of Debentures, &c., as between themselves.

Priorities of
debenture
holders.

Primâ facie the holders of debentures will rank in priority according to the date of the issue of the debentures (*s*). If the debentures bear the same date and are numbered, their numerical order is *primâ facie* the order of their issue (*t*), but if necessary the Court will inquire as to the order in which they were in fact issued (*u*). If, however, there is anything in the debentures themselves to show an intention that the holders are to rank *pari passu* one with another, irrespective of the order of issue, they will so rank (*r*).

Debenture
holders ranking
pari passu.

When there is a series of debentures containing a charge it is usual to introduce a clause expressly providing that all the holders of the same series shall rank *pari passu* one with another. Such a clause will not prevent a debenture holder from suing the company for money due to him in respect of his debentures (*x*), nor from presenting, as creditor for such

(*p*) *Robson v. Smith* [1895], 2 Ch. 118. In this case there was only one debenture, that held by Robson, who had recovered judgment thereon and issued execution.

(*q*) *Lee v. Roundwood Colliery Co.* [1897], 1 Ch. 373.

(*r*) See *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81; and *Melbourne Brewery and Distillery Co.* [1901], 1 Ch. 453, as to a clause that the security should be enforceable on any breach of the covenants in the trust deed. As to the position

of persons dealing with a company without notice of the terms of the debentures, see *ante*, pp. 321, 322.

(*s*) *Gartside Silkstone Co.*, 21 Ch. D. 762; *James v. Boythorpe Colliery Co.*, W. N. 1890, 28; and as to when they are issued, see *ante*, p. 308.

(*t*) *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. pp. 171.

(*u*) *Gartside Silkstone Co.*, 21 Ch. D. 762.

(*v*) See case in last note.

(*x*) *Bolckow v. Herne Bay Pier Co.*, 1 E. & B. 74.

money, a petition to wind up the company (*y*), if he is otherwise entitled to do so. If, however, the debentures charge the whole of the company's property, he will not be entitled to issue execution on his own account only, on a judgment obtained for the payment of such money; if he does so, and the other debenture holders intervene, he will be treated as a trustee of the execution for his and their benefit (*z*), though if he has realised his execution, and thus obtained payment before they intervene, he will not be compelled to account to them for the proceeds (*a*).

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Only persons who are holders with a good title (*b*) of debentures of the series, and persons who, though not actual holders, are in equity entitled to be treated as holders (*c*), can claim the benefit of the clause; and these persons may be able to dispute the title of others who claim to be debenture holders when the company would be estopped from doing so (*d*).

Persons entitled
to rank
pari passu.

As between the persons entitled to the benefit of the clause, the fact that the debentures were not all issued on the same terms or for the same purposes, is immaterial; all will be entitled to rank *pari passu* against the property comprised in the debentures, and to recover thereout the full amount to which they are entitled as between themselves and the company. For instance, if some of the debentures are issued by way of security for a debt of less value than the nominal amount of the debentures, the holder of these debentures will be entitled to prove for the full nominal amount of the debentures against the property comprised therein *pari passu* with the holders of the other debentures, though of course he will not be entitled to recover more than the whole amount for

Rights under
pari passu
clause.

(*y*) *Borough of Portsmouth, &c., Tram. Co.* [1892], 2 Ch. 362.

Scott, 9 App. Ca. p. 539.

(*z*) *Bowen v. Brecon Rail. Co.*, 3 Eq. 541. See, however, the *quære* on this case in *Potteries, &c., Rail. Co.*, 5 Ch. p. 69. The question is not of much importance since the decisions that a floating charge has priority over an execution creditor. As to the right to take a separate security in such cases, see *Murray v.*

(*a*) *Fountains v. Carmarthen Rail. Co.*, 5 Eq. p. 324.

(*b*) *Mowatt v. Castle Steel, &c., Co.*, 34 Ch. D. 58.

(*c*) *Pegge v. Neath and District Tram. Co.* [1898], 1 Ch. 183; *Queensland Land and Coal Co.* [1894], 3 Ch. 181, and *ante*, p. 307.

(*d*) *Mowatt v. Castle Steel, &c., Co.*, 34 Ch. D. 58.

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Robinson v.
Montgomeryshire
Brewery Co.

which the debentures were a security (e). Again, where a company allowed its agent to have possession of a debenture stock certificate for the purpose of raising a certain sum of money upon the security of it, and the agent exceeded his authority and raised a larger sum, and misappropriated the difference, the person who had advanced the money on the security of the certificate *bonâ fide* and without notice of the agent's fraud or the limit of his authority, was held entitled to rank *pari passu* with the other debenture stock holders until he had recovered the full amount advanced by him with interest (f). In this case it is to be noticed that the debenture stock certificate was properly issued, though the right of the holder to recover the full amount advanced by him depended upon the company being estopped from setting up the limit placed upon their agent's authority. The estoppel arose from the company having given their agent the certificate for the purpose of enabling him to raise money on it (g).

Effect of
pari passu
clause.

Set-off.

The clause under consideration in effect makes the property charged by the debentures a common fund for the payment of all the debenture holders of the series. It is a well-established rule in equity, that a person who has to contribute to a common fund cannot receive anything out of it without first paying what is due from him to it. If, therefore, the debentures contain a charge on the whole of the company's assets, a holder of a debenture indebted to the company or otherwise liable to contribute to its assets, cannot receive anything in respect of his debenture out of those assets without first paying what is due from him (h). If, however, the debentures are assignable free from equities, the debenture holders cannot prevent one of their number, against whom the company has a claim, and who therefore would be within the scope of the rule above mentioned, from transferring his debenture to another person, even after the company has gone into voluntary liquidation,

(e) *Regent's Canal Ironworks Co.*, 3 Ch. D. 43.

(f) *Robinson v. Montgomeryshire Brewery Co.* [1896], 2 Ch. 841.

(g) See *Perry Herrick v. Attwood*, 2 De G. & J. 21; *Brocklesby v. Temperance Building Society* [1895],

A. C. 173.

(h) *Farmer v. Goy & Co.* [1900], 2 Ch. 149 (liability to company for misfeasance). See, too, *Auriferous Properties* [1898], 2 Ch. 428; *Ex parte Theys*, 25 Ch. D. p. 593.

and judgment has been given in a debenture holders' action, and the transferee, if he has purchased the debenture for value without notice of the claim against the transferor, will take it free from any right of set-off by the company, and free from any liability to contribute to the common fund in respect of such claim (i).

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Where a company issues a series of debentures of which the holders rank *pari passu*, it is of great practical advantage both to the company and the debenture holders that there should be some means by which arrangements may be made in cases of difficulty between the company and the debenture holders as a body, without the necessity of obtaining the consent of every individual debenture holder. If the company is in course of being wound up, this can be done under the Joint Stock Companies Arrangement Act, 1870 (k), but that Act does not apply until a winding up has commenced. To meet this difficulty it is now usual to insert in the trust deed, or less frequently in the debentures themselves, a clause giving power to a meeting of the holders of the debentures of the same series by resolution to sanction a compromise or modification of the rights of the debenture holders, and to enter into other arrangements of a similar character with the company (l). Such a clause is free from objection (m), but the power must be exercised *bonâ fide* for the common benefit of the whole body of the debenture holders (n), and being open to abuse, will be strictly construed, and will only apply to cases clearly

Powers given
to majorities of
debenture
holders.

(i) *Farmer v. Goy & Co.* [1900], 2 Ch. 149. The transfer had not been registered, and the liquidator on behalf of the company declined to register it, and claimed a set-off; but the right to have the transfer registered being absolute, the transferee was treated as though it had been registered.

(k) See *infra*, Bk. IV., c. 1, § 11. The Act is printed in the Appendix.

(l) Sometimes a similar power is given to a certain majority of the debenture holders, and is exercisable by writing under their hands.

See Palmer's Company Precedents, Part III., p. 229.

(m) *Hay v. Swedish, &c., Rail. Co.*, 5 Times L. R. 460, and cases in the following notes.

(n) See *Finlay v. Mexican Invest. Corp.* [1897], 1 Q. B. 517, and *infra*, pp. 439-440, and cases with reference to an alteration of articles of association, *infra*, Bk. III., c. 1, § 4. 3; and reduction of capital, Bk. III., c. 3, § 1. 3; and decisions under the Joint Stock Companies Arrangement Act, 1870, Bk. IV., c. 1, § 11.

Bk. II. Chap. 5. falling within it. Thus a power to sanction a compromise
 — Sect. 4. — of the rights of the debenture holders will not authorise the majority to give up any of the rights if there is no dispute and no difficulty in enforcing them (o). If, however, the circumstances to which the power applies have arisen, and the power is properly exercised, the minority will be bound by the acts of the majority. Under such a power resolutions duly passed at a meeting of debenture holders sanctioning a loan to the company and giving that loan a priority over the debentures (p), and sanctioning a scheme of arrangement under which the debenture holders of one company were to exchange their debentures for fully paid-up shares in another company formed for the purpose of acquiring the business of the original company (q), have been held valid and binding on a dissentient minority.

If a debenture holder has effected a policy ensuring the payment by the company of his debenture on the day therein named, and a meeting of debenture holders sanction an arrangement with the company by which the day for payment is postponed, and in consequence the company do not pay his debenture on the day named, he can, if he has not voted for the resolution, recover the amount of his policy from the insurers, and they will be subrogated to his rights as modified by the resolution (r).

Meetings how
called.

If the trust deed or debenture does not provide for the manner in which a meeting of the debenture holders is to be summoned, notice by advertisement will be sufficient if the debentures are payable to bearer, and perhaps also in other cases (s).

(o) *Mercantile Investment, &c., Co. v. International Co. of Mexico* [1893], 1 Ch. 484; compare the decision relating to the same company, *Mercantile Investment, &c., Co. v. River Plate, &c., Co.* [1894], 1 Ch. 578, where a difficulty in enforcing the debenture holders' rights had arisen. See, too, *Alabama, New Orleans, &c., Co.* [1891], 1 Ch., pp. 228 and 243.

(p) *Follet v. Eddystone Granite Quarries* [1892], 3 Ch. 75.

(q) *Sneath v. Valley Gold Co.* [1893], 1 Ch. 477; *Mercantile Investment, &c., Co. v. River Plate Co.* [1894], 1 Ch. 578.

(r) *Finlay v. Mexican Investment Corporation* [1897], 1 Q. B. 517. See, too, *Dane v. Mortgage Ins. Corp.* [1894], 1 Q. B. 54.

(s) *Mercantile Investment, &c., Co. v. International Co. of Mexico* [1893], 1 Ch., p. 488, note.

7. *Of the Remedies of Debenture Holders and of Debenture Holders' Actions.*

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Sect. 4.

The rights and remedies to which a debenture holder or debenture stock holder is entitled must in each case depend upon the nature and terms of his security (*t*). If as is usually the case he is entitled to a mortgage or charge upon any portion of the company's property, he will, speaking generally, be entitled to enforce his rights in the same manner as if he were the holder of a similar mortgage or charge upon the property of an individual, and it is not proposed here to discuss the general law on the subject. The following remarks will be confined to those points which are peculiar to or of special importance in connection with debentures and debenture stock.

Remedies of
debenture
holders.

The debentures, or more often the trust deed for securing the debentures or debenture stock, generally confer upon the debenture holders or their trustees very extensive powers for the management and realisation of their security in case of default by the company. The powers so conferred depend in each case upon the terms in which they are expressed, and must be exercised according to those terms. They generally include an express power of sale and the power to appoint a receiver and manager. It would appear that the provisions of the Conveyancing and Law of Property Act, 1881, relating to the power of sale and the appointment of a receiver by mortgagees whose mortgages are under seal, do not apply to debentures in the ordinary form when under seal (*u*). If the power of appointing a receiver or manager on behalf of the debenture holders is by the terms of the debenture holders' security vested in a particular person, he must exercise the power solely in the interests of the debenture holders, and if he does not do so the Court can interfere and make the appointment (*x*). As will be seen hereafter, the debenture holders can in most cases obtain

Remedies under
powers con-
tained in the
debentures, &c.

Receiver and
manager.

(*t*) As to actions against companies, see *infra*, chap. 8.

(*u*) *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399. The nature of the company in this case

was such that the debenture holders had no right to a sale of its undertaking. See *infra*, p. 334.

(*x*) *Stewart v. Maskelyne British Typewriter, Ltd.* [1898], 1 Ch. 133.

Bk. II. Chap. 5. the appointment of a receiver and manager by application to
Sect. 4. the Court; there are, however, some important differences in the position of a receiver and manager appointed by the Court and one appointed by the debenture holders under a power vested in them.

Differences in position between receiver and manager appointed by the Court and one appointed by the debenture holders.

A receiver or receiver and manager appointed by the Court is an officer of the Court, and any interference with him or with property in his possession is a contempt of Court and punishable accordingly; a person who desires to obtain possession of such property must apply to the Court for an order for its delivery or for permission to take it (*y*). Such permission is necessary even if the person claiming possession claims under a paramount title and the receiver has been erroneously appointed (*z*). His rights and duties are regulated by the general law and by the terms of the order appointing him, and in any case of doubt or difficulty he should act under the direction of the Court (*a*). He is not the agent either of the company or of the debenture holders; if he were an agent at all, he would be the agent of the Court, but this he cannot be, consequently he is *primâ facie* personally liable for all orders given by him, and the addition of the words "receiver and manager" to his signature to an order is not sufficient to exclude his personal liability (*b*); he is, however, entitled to an indemnity out of the property or business of which he is the receiver or manager against any liabilities properly incurred by him, and his right to indemnity takes priority over the claims of the debenture holders (*c*). On the other hand, a receiver or receiver and manager appointed by the debenture holders or their trustees under a power vested in them, is not an officer of the Court, and his powers are limited by the terms of his appointment and the document which authorises it, and by the

(*y*) See *Helmores v. Smith*, 34 Ch. D. 449; Kerr on Receivers, 3rd ed. 139 *et seq.*; 1 Seton, 6th ed. 780.

(*z*) *Ames v. Birkenhead Dock*, 20 Beav. 332.

(*a*) A useful collection of forms of orders relating to receivers and managers will be found in Palmer's Company Precedents, 8th ed., Part

III., cc. LVII. and LXXII.; and see generally Kerr on Receivers; 1 Seton, 6th ed. 749 *et seq.* and 768.

(*b*) *Burt, Boulton and Haywood v. Bull* [1895], 1 Q. B. 276.

(*c*) *Ib.*; and *Strapp v. Bull, Sons & Co.* [1895], 2 Ch. 1; *Batten v. Wedge-wood Coal Co.*, 28 Ch. D. 317.

provisions of the Conveyancing and Law of Property Act, 1881, if and when that Act applies (*d*). He is an agent either of the company or of the debenture holders or trustees who appoint him, and therefore is not personally liable for orders given by him unless he pledges his own credit (*e*). Under the ordinary form of debenture or debenture trust deed or under the provisions of the Conveyancing and Law of Property Act, 1881, a receiver or manager appointed by the debenture holders or their trustees is the agent of the company (*f*), and though his authority to act on behalf of the company ceases if the company is ordered to be wound up, he does not thereupon become the agent of the persons who appointed him, and they are not responsible for his acts unless they have in fact given him authority to act for them (*g*). If, however, the document under which he is appointed does not state, or otherwise indicate, that he is to act as agent of the company he will be the agent of the persons who appointed him (*h*). Moreover, the appointment of a receiver and manager by the Court acts as a dismissal of the company's servants (*i*), but it is apprehended that such an appointment by the debenture holders would not have this effect, at all events if the receiver and manager when appointed is the agent of the company.

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Sect. 4.

The liability of a receiver and manager, whether appointed by the Court or by the debenture holders, for rates levied by the overseers of the poor and general district rates in respect of the company's premises, depends upon whether he has or has not taken possession of the premises in such a way as to create a change of occupation within the rating

Liability of
receiver for
rates.

(*d*) See 44 & 45 Vict. c. 41, §§ 19—24, and *ante*, p. 333. The Act does not extend to managers.

(*e*) *Owen & Co. v. Cronk* [1895], 1 Q. B. 265.

(*f*) See the Act, § 24 (which only applies to receivers and not to managers), and forms in *Palmer's Company Precedents*, 8th ed., Part III., pp. 222 and 261, and the case in next note, especially the judgment of Rigby, L.J. [1896], 1 Q. B., p. 691 *et seq.*

(*g*) *Gosling v. Gaskell* [1897], A. C.

575, reversing *Gaskell v. Gosling* [1896], 1 Q. B. 669. *Qu.* whether under such circumstances the receiver is not personally liable either directly or on breach of warranty of authority, see [1897], A. C. pp. 592 and 596.

(*h*) *Vimbos, Ltd.* [1900], 1 Ch. 470.

(*i*) *Reid v. Explosives Co.*, 19 Q. B. D. 264; but see remarks of Lindley, L.J., in *Marriage, Neave & Co.* [1896], 2 Ch., p. 672, when such dismissal would amount to a breach of contract.

Bk. II. Chap. 5. Acts (k) ; if he has done so he will be liable (l), if he has not
Sect. 4. --- done so he will not be liable, and the mere entry upon the
premises for the purpose of carrying out his duties as a receiver
and manager will not create a change of occupation (m).

Debenture
holders' actions.
Parties.

If the debenture holders or debenture stock holders are entitled to rank *pari passu* one with another, a debenture holder or debenture stock holder who wishes to enforce his security (n) should either sue on behalf of himself and all other holders of debentures or debenture stock of the same series as his own, or make the other holders (if any), on whose behalf he does not sue, defendants to the action (o). If he sues on behalf of others he must specify the class of persons on whose behalf he sues as accurately as possible (p).

If the debentures or debenture stock are secured by a trust or covering deed, the trustees can bring an action to have the trusts of the deed carried into execution and to realise their security, or can join with a debenture holder or stock holder in so doing. But it is, perhaps, more usual for a holder of debentures or debenture stock to bring the action and make the trustees defendants with the company and to ask that the trusts of the deed be carried into execution (pp).

Sale.

The relief most usually asked for and obtained in a debenture holders' action is for the appointment of a receiver and manager, and for a sale of the property comprised in the security. The right to a sale is sometimes excluded by statute, and cannot, as

(k) *Marriage, Neave & Co.* [1896], 2 Ch. 663. As to distress for rates levied by the overseers of the poor, see *ante*, p. 325.

(l) *Richards v. Overseers of Kidderminster*, ib., p. 212, and *Richards v. Mayor of Kidderminster*, ib., p. 212 (district rate) ; note the wording of the trust deed relied upon by North, J., as to the fact of change of occupation, pp. 219—220.

(m) *Marriage, Neave & Co.*, *ubi supra* ; the order appointing the manager did not order delivery up of possession to him. As to liability for gas rates, see *Paterson v. Gas Light and Coke Co.*, ib., p. 476, where it was decided

that under the Acts in question the gas company could cut off the supply of gas unless the receiver paid certain arrears of rates. As to water rates, see *Ex parte Berry* [1900], 2 Q. B. 32.

(n) As to the effect of such a clause on his right to bring an action for the money due to him, see *ante*, p. 326.

(o) See as to actions by one person on behalf of himself and others, *infra*, Bk. III., c. 9, § 1. 3.

(p) *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36.

(pp) See *Mortgage Ins. Corp., Ltd. v. Canadian Agricultural, &c., Co.* [1901], 2 Ch. 377 ; and 3 Seton, 6th ed. p. 2024.

a rule, be obtained in the case of a company formed for a public purpose whose undertaking is regulated by statute (q). Bk. II. Chap. 5.
Sect. 4.

If the charge, though a general floating one, is contained in the debentures (r), the holders of the debentures may obtain an order for foreclosure instead of sale against all the property, including uncalled capital, comprised in their charge (s), but this relief cannot be obtained unless all the debenture holders are before the Court and assent to such an order (t). Foreclosure.

When an order for foreclosure is asked *against* debenture holders, it appears that all the debenture holders must be parties to the action (u), even though their security is still a floating charge (x). But this rule does not apply when the charge under which the debenture holders claim is contained in a trust deed; in that case the trustees of the deed sufficiently represent them (y).

Debenture holders are entitled, subject to any special bargain between themselves and the company, postponing their right (z) to commence proceedings for the realisation of their security, and to obtain the appointment of a receiver (a) as soon as the principal money or any interest thereon is in arrear (b), or before that time, if the security is in jeopardy (c). When action
may be brought.

And receiver be
appointed.

(q) *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36; *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399. See, too, *Gardner v. London, Chatham and Dover Ry.*, 2 Ch. 201, &c., and *infra*, notes (g) and (h).

(r) Foreclosure is not the proper remedy in the case of a trust deed which is generally in the form of a trust for sale.

(s) *Sadler v. Worley* [1894], 2 Ch. 170. See form of order, p. 177, and 3 Seton, 6th ed. 2030. *Seemle*, such an order will not be made in chambers. *Hulifax, &c., Banking Co. v. Radcliffe, Ltd.*, W. N. 1895, 63.

(t) *Elias v. Continental Oxygen Co.* [1897], 1 Ch. 511.

(u) *Griffith v. Pound*, 45 Ch. D., p. 565, but compare *Fairfield, &c., Co. v. London, &c., Co.*, W. N. 1895, 64.

(x) *Wallace v. Evershed* [1899], 1 Ch. 891.

(y) R. S. C. Order XVI., r. 8. The

last paragraph of this rule was added to supersede *Francis v. Harrison*, 43 Ch. D. 183.

(z) Very often this right is postponed until interest has been in arrear for a certain time, as in *Government Stock, &c., Co. v. Manila Rail. Co.* [1897], A. C. 81. The terms of the debentures may entitle them to bring an action on the happening of other events, see for instance *Budgett v. Improved Patent, &c., Furnace Syndicate*, W. N. 1901, 23.

(a) The Court always has a discretion in appointing a receiver. See *infra*, Bk. III., c. 9, § 4. 5, but in the class of cases now under consideration the appointment is almost a matter of course.

(b) *Strong v. Curly Press* [1893], 1 Ch. 268. If a particular place is fixed for payment, see *Thorn v. City Rice Mills*, 40 Ch. D. 357.

(c) *MacMahon v. North Kent Iron-*

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Moreover, if the principal money and interest are secured by a floating charge on the company's undertaking, they are deemed to become due on the commencement of the winding up, although the time stipulated for payment has not arrived, so as to entitle the debenture holders to obtain the appointment of a receiver and manager, to realise their security and to receive thereout the full amount due to them for principal and interest without any deduction by way of discount for payment before the stipulated day (*d*).

A receiver may be appointed of property abroad, but in such a case the mere order of the English Court does not put him in possession of the property (*e*).

Manager.

If the charge to which the debenture holders are entitled includes the company's business, they will be entitled to have a person appointed manager and receiver (*f*), unless the company's business is an undertaking governed by statute which precludes the debenture holders from obtaining an order for its sale (*g*); in such cases they are only entitled to a receiver (*h*). A manager is never appointed by the Court

works Co. [1891], 2 Ch. 148; *Smith v. Wilkinson* [1897], 1 Ch. 158; in these cases the company was insolvent, and a winding-up petition had been or was on the point of being presented; *Edwards v. Standard Rolling Stock Syndicate* [1893], 1 Ch. 574 (execution threatened and company consenting). See, too, *Foster v. Borax Co.* [1901], 1 Ch. 326, and *ib.* [1899], 2 Ch. 130.

(*d*) *Wallace v. Universal Automatic, &c., Co.* [1894], 2 Ch. 547; *Hodson v. Tea Co.*, 14 Ch. D. 859; *Panama, &c., Co.*, 5 Ch. 318. But if they seek to prove in the winding up, see *Ex parte Ador* [1891], 2 Q. B. 574, and *infra*, Bk. IV., c. 1, § 12. 2.

(*e*) *Perry v. Oriental Hotel Cos.*, 5 Ch. 420; *Mercantile Investment, &c., Co. v. River Plate Co.* [1892], 2 Ch. 303 (where a receiver was refused as being useless); *Maudslay v. Maudslay, Sons & Field* [1900], 1 Ch. 602; see, too, *Penn v. Lord*

Baltimore, 1 White & Tudor's Leading Cases, 755 *et seq.*

(*f*) *Peek v. Trinemaran Iron Co.*, 2 Ch. D. 115; *Makins v. Percy Ibbotson & Sons* [1891], 1 Ch. 133; *Edwards v. Standard Rolling Stock Ld.* [1893], 1 Ch. 574 (company consented); *Smith v. Wilkinson* [1897], 1 Ch. 158; and where the business is included by implication, *e.g.*, a charge on a colliery lease, see *Campbell v. Lloyds', &c., Bank* [1891], 1 Ch. 136; *County of Gloucester Bank v. Rudry, Merthyr, &c., Co.* [1895], 1 Ch. 629, distinguishing *Whitley v. Challis* [1892], 1 Ch. 64.

(*g*) Tramway companies have a power of sale with the consent of the Board of Trade under § 44 of 33 & 34 Vict. c. 78, but this does not entitle the debenture holders to an order for sale; see cases in the next note.

(*h*) *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36; *Blaker v. Herts and Essex Waterworks Co.*,

except temporarily, and with a view to the sale or winding up of the business (i), and it is usual for the order appointing him to direct that he shall not act as manager beyond a specified time without the leave of the Court (k). Bk. II. Chap. 5.
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In cases of emergency the Court will empower a receiver or manager to borrow money for the preservation of the company's property as a first charge on the undertaking in priority to the debenture holders, and such an order may be made in an action by one debenture holder suing on behalf of the others (l). Leave to borrow
in priority to
debenture
charge.

When the plaintiff is suing on behalf of himself and others, and the judge is of opinion that there must eventually be a sale, he may direct a sale before judgment, or after judgment, before all the persons interested are ascertained, whether they are served or not (m). Sale when
ordered.

The common form of judgment on the hearing of a debenture holders' action has given rise to considerable discussion. Some judges have declined to make any declaration of charge if the action comes on as a short cause (n); others have made such a declaration (o). The common form of judgment now adopted is as follows (p): Form of judg-
ment on
hearing.

Declare that the plaintiff and all others, the holders of mortgage debentures (q) of the defendant company of the same issue as the plaintiffs'

41 Ch. D. 399; *Gardner v. London, Chat. & Dover Ry. Co.*, 2 Ch. 201. *Bartlett v. West Metropolitan Tram. Co.* [1893], 3 Ch. 437, and [1894], 2 Ch. 286, *contra*, is overruled; see [1895], 2 Ch. 36. See, too, *Pegge v. Neath District Tram. Co.* [1895], 2 Ch. 508.

(i) *Roberts v. Eberhardt*, Kay, 148; *Gardner v. London, Chatham & Dover Ry.*, 2 Ch. p. 212; Partn. p. 531.

(k) *Palmer's Company Precedents*, 8th edit., Part III. p. 358, and *Forms*, pp. 412, 413.

(l) *Greenwood v. Algeciras, &c., Rail. Co.* [1894], 2 Ch. 205. See, too, *Strapp v. Bull, Sons, & Co.* [1895], 2 Ch. 1.

(m) R. S. C. Order LI. r. 1b. And generally as to sales by the Court, see Order LI. When the

sale is out of Court, see *Cumberland Union Bank Co. v. Maryport Hæmatite, &c. Co.* [1892], 2 Ch. 92.

(n) *Charlwood v. Leasehold Invest. Co.*, W. N. 1895, p. 47; and see *Mason v. British Railway, &c., Co.*, W. N. 1898, 173.

(o) *Marwick v. Lord Thurlow* [1895], 1 Ch. 776; *Brinsley v. Lynton, &c., Co.*, W. N. 1895, p. 53; *Parkinson v. Wainwright & Co.*, ib. p. 63.

(p) *Downes v. Wolverhampton District Brewery, Ltd.*, W. N. 1899, 229, and *Wissner v. Levison and Steiner*, W. N. 1900, p. 152, in which case the debentures had not become payable.

(q) Any debenture which contains a charge is called a mortgage debenture.

Bk. II. Chap. 5. debentures are entitled to a charge upon [NOTE—the property charged by the order is taken from the language of the debenture which is produced to the Registrar] for securing the repayment of the principal moneys and interest in the debentures mentioned.

Let the following accounts and enquiries be taken and made :

(1) An account of what is due to the plaintiffs and the other holders of mortgage debentures issued by the defendant company under and by virtue of such debentures. [*If more than one series of debentures has been issued add—distinguishing the holders of the first mortgage debentures and the second mortgage debentures in the statement of claim referred to.*]

(2) An enquiry of what the property comprised in and charged by the said mortgage debentures consists, and with whom the same is vested.

(3) An enquiry what other incumbrances affect the property comprised in or charged by the said debentures, or any and what part thereof, and in whom the same are vested.

(4) An account of what is due to such other incumbrancers respectively.

(5) An enquiry what are the priorities of such other incumbrancers and the said debentures respectively, and what property other than that comprised in the said debentures is comprised in such other incumbrances.

Adjourn further consideration in chambers (r).

If the debenture holder's security comprises uncalled capital the master may, in answer to the second of the above enquiries find what uncalled capital is due from the several shareholders, and if the plaintiff is found to be indebted to the company in respect of uncalled capital, he is bound by the finding, unless it be varied by the judge; the certificate may, however, be varied by striking out such a finding, if its existence embarrasses other shareholders (s).

When the debentures contained a floating charge a sixth enquiry used to be added to ascertain whether there were any debts of the company which had priority over the claims of the debenture holders under the Preferential Payments in Bankruptcy Amendment Act, 1897, but this enquiry is now omitted (t).

When receiver is appointed.

In all cases where a receiver is appointed in a debenture holder's action, a direction is to be inserted in the order that the receiver do forthwith, out of any assets coming to his

(r) For other forms of judgment, see 3 Seton, 6th ed., pp. 2023 *et seq.*, Palmer's Company Precedents, Part III., pp. 432 *et seq.*, and for the form of notice sent out after judgment, see Annual Practice, 1902, p. 191.
 (s) *Madeley v. Ross, Sleeman & Co.* [1897], 1 Ch. 505.
 (t) *Re Debenture holders' Actions*, W. N. 1900, p. 58.

hands, pay the debts of the company which have priority over the claims of the debenture holders under the Preferential Payments in Bankruptcy Amendment Act, 1897 (u); and that the receiver be allowed all such payments in his accounts.

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The undertaking given by the plaintiff in a debenture holder's action on the appointment of a receiver who is to act at once is to be so framed as to extend to all liabilities which would be covered by the security when completed, and not only to the receiver's receipts (x).

The general rule as to the order in which the costs and other expenses incurred in a debenture holders' action are to be paid, where the plaintiff sues on behalf of himself and the other debenture holders, is as follows (y): (1) the plaintiff's costs of the realisation of the property (z); (2) the moneys due to the receiver and manager including his remuneration and costs of suit; (3) the costs, charges and expenses of the trustees of the covering deed; (4) the plaintiff's costs of action (a). All the above costs and expenses have priority over the claims of the debenture holders.

Costs, &c. in
debenture
holders' actions.

If the trustees are defendants and appear by the same solicitor as the company, they will be allowed a full set of costs, except as regards any separate costs of the defendant company (b).

Costs of trustees.

If the receiver has been authorised to raise, and has raised money under a charge taking priority over the debentures, this charge will, nevertheless, be subject to the costs of realisation and the remuneration of the receiver (c).

If the plaintiff has sued on behalf of all debenture holders, and it turns out that the debentures do not rank *pari passu*, but in order of date, and there are no funds for the payment

(u) Seton, 6th ed., pp. 768-9. As to this Act, see *infra*, Bk. IV. c. 1, § 12, and *Mannesmann Tube Co., Ltd.* [1901], 2 Ch. 93.

(x) *Re Debenture holders' Actions*, W. N. 1900, p. 58. Seton, 6th ed., p. 768 and p. 2024.

(y) *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317; see, too, *Strapp v. Bull, Sons, & Co.* [1895], 2 Ch. 1.

(z) In a proper case this would include the costs of an abortive sale,

28 Ch. D. 317.

(a) If another debenture holder has been substituted for the original plaintiff, their costs will be paid *pari passu*, *ib.*

(b) *Mortgage Insurance Corp. v. Canadian Agricultural, &c., Co.* [1901], 2 Ch. 377; see form of order on p. 382.

(c) *Smith v. Lubbock*, W. N. 1901, 105.

Bk. II. Chap. 5. of his own debenture, he will, nevertheless, be entitled to his costs of action other than those (if any) which have been incurred in support of his own security only (*d*).

Scale of costs. If the property comprised in the debentures is more than sufficient to pay in full all the debenture holders on whose behalf the plaintiff sues, the plaintiff is only entitled to costs as between party and party (*e*); if it is insufficient for this purpose, he is entitled to costs as between solicitor and client (*ee*).

8. *Of the Position of Debenture Holders when the Company is being wound up.*

Debenture holders and winding up of company.

The circumstances under which a debenture holder is entitled to present a petition to wind up the company will be noticed hereafter (*f*); here it is only necessary to say that if he is otherwise entitled to do so, he will not be deprived of his right by having brought an action to enforce his security and obtained judgment therein (*g*).

The holders of debentures which contain a charge on the company's property are secured creditors, and their rights, like those of other secured creditors, have priority in respect of the property comprised in their security—which is very generally the whole of the company's assets—over the claims of the shareholders and of unsecured creditors, except that the debts mentioned in the Preferential Payments in Bankruptcy Act, 1888 (*h*), have, so far as the assets available for the payment of the general creditors may be insufficient to meet them, priority over the claims of holders of debentures under any floating charge created by the company (*i*). Such debts have a similar priority, if a receiver is appointed or possession taken on behalf of the debenture holders (*k*).

Proof by debenture holders.

Debenture holders need not come in and prove under the

(*d*) *Carrick v. Wigan Tram. Co.*, W. N. 1893, p. 98.

(*h*) 51 & 52 Vict. c. 62. See *infra*, Bk. IV. c. 1, § 12. 2.

(*e*) *Queen's Hotel Co., Cardiff* [1900], 1 Ch. 792; *Vernon Tin Plate Co.*, *ib.*

(*i*) 60 & 61 Vict. c. 19, § 1. See, too, as to claims under the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37, § 5 (1).

(*ee*) *Smith v. Lubbock* [1901], 2 Ch. 347.

(*k*) 60 & 61 Vict. c. 19, § 2, and form of order, *ante*, p. 338. The Act applies to debenture stock as well as to debentures.

(*f*) *Infra*, Bk. IV. c. 1, § 3.

(*g*) *Borough of Portsmouth, &c., Tram. Co.* [1892], 2 Ch. 362.

winding up of the company ; if they do so they are subject to the rules applicable to other secured creditors ; these rules will be discussed hereafter (Bk. IV. c. 1, § 12. 2).

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Debenture holders' actions are proceedings outside the winding up of the company, and the winding up of the company does not deprive the debenture holders of their right to realise their security and obtain the appointment of a receiver or manager (*l*). But if the winding up is under an order or under the supervision of the Court, leave must be obtained to commence or, if already commenced, to proceed with the action (*m*).

Effect of
winding up on
debenture
holders' actions.

The winding up of the company has also an important influence on the choice of the person who will be appointed receiver or manager on behalf of the debenture holders. The position and duties of a receiver largely correspond with and overlap the position and duties of a liquidator, and this is especially the case when the receiver is appointed by the Court, and the winding up is under an order or under the supervision of the Court ; in these cases both the receiver and the liquidator are under the control of and responsible to the Court (*n*). In such cases it is considered desirable on the grounds of economy and convenience to unite the two offices in one person, and the practice is to appoint the liquidator receiver on behalf of the debenture holders (*o*) ; if a receiver has been already appointed in the debenture holders' action, he will be discharged and the liquidator appointed in his place (*p*). The rule is, however, a rule of convenience only, and will yield to special circumstances ; thus if the debentures

Effect of
winding up on
appointment of
receiver by the
Court.

Under compul-
sory or super-
vision order.

(*l*) See *Lloyd v. David Lloyd & Co.*, 6 Ch. D. 339 ; *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150 ; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681, where the mortgaged property was in Italy and the mortgagees were taking proceedings there.

(*m*) See *infra*, Book IV., c. 1, § 6. 3, and c. 2, § 2, as to the effect of a winding up on actions against the company.

(*n*) See, as to a receiver, *ante*, p. 332, and as to the position of the

liquidator, Bk. IV. c. 1, § 10.

(*o*) *Perry v. Oriental Hotels Co.* 5 Ch. 420 (winding up under supervision) ; *Campbell v. Compagnie Générale de Bellegarde*, 2 Ch. D. 181 ; *British Linen Co. v. South American, &c., Co.* [1894], 1 Ch. 108.

(*p*) *Campbell v. Compagnie Générale de Bellegarde*, 2 Ch. D. 181 ; if he is discharged the liquidator should be appointed in his place, see *British Linen Co. v. South American, &c., Co.* [1894], 1 Ch. 108.

Bk. II. Chap. 5. comprise the whole of the company's assets, and the debenture debt exceeds the value of the assets, a receiver appointed in the debenture holders' action will not be displaced, and if the liquidator desires to impeach the debentures, this is an additional reason against displacing the receiver (q). If the nature of the assets renders such a course desirable, the receiver appointed in the debenture holders' action may be continued in respect of some of the assets, and the liquidator be appointed receiver in respect of the remainder (r). If there is a substantial amount of uncalled capital comprised in the debenture holders' security, this is a reason for appointing the liquidator receiver, for he alone has power to call up such capital (s). If the winding up is under an order of the Court, the Court may appoint the Official Receiver to be receiver in a debenture holders' action, but he has no other right to be appointed except so far as he is an officer of the Court and has rights in the winding up conferred by statute (t).

Voluntary winding up.

If the winding up is voluntary the liquidator is appointed by the shareholders, and is not an officer or under the control of the Court; special circumstances therefore would have to be shown before the Court would appoint him receiver against the wishes of the debenture holders (u).

Receiver appointed by the debenture holders.

If the debenture holders have power to appoint a receiver, or receiver and manager, and exercise their power, other considerations arise. In that case the debenture holders are not asking the Court for any assistance, and the person appointed by them is not an officer or under the control of the Court, nor does he derive his powers from the Court; the Court therefore will not without strong reasons displace him in favour of the liquidator (x). If the winding up

(q) *Strong v. Carlyle Press* [1893], 1 Ch. 269.

(r) *British Linen Co. v. South American, &c., Co.* [1894], 1 Ch. 108.

(s) See *Barney v. Joshua Stubbs, Ltd.* [1891], 1 Ch. p. 483.

(t) See Companies Winding-up Act, 1890, § 4 (6), and *Strong v. Carlyle Press* [1893], 1 Ch., p. 274; he was appointed as to part of the assets in *British Linen Co. v. South*

American, &c., Co. [1894], 1 Ch. 408. See, further, as to the position of this officer, *infra*, Bk. IV. c. 1, § 8.2.

(u) See *Boyle v. Bettwys Llantrôt Colliery Co.*, 2 Ch. D. 726.

(x) *Henry Pound, Son and Hutchings*, 42 Ch. D. 403, and *Barney v. Joshua Stubbs, Ltd.* [1891], 1 Ch. 475; *Strong v. Carlyle Press* [1893], 1 Ch. 268; and as to the position of the receiver, see *ante*, pp. 332, 333.

is compulsory, or under the supervision of the Court, and a liquidator has been appointed, the sanction of the Court must be obtained before a receiver appointed by the debenture holders can go into possession, but this sanction will not be withheld without good reason (*y*). In practice, however, when the company is being wound up by or under the supervision of the Court, the debenture holders usually apply to the Court for the appointment of a receiver and manager, for in such cases the powers of management of a receiver and manager appointed by themselves cease on the commencement of the winding up if, as is generally the case, he is the agent of the company (*z*).

The Court has no jurisdiction to fix the remuneration of a receiver appointed by debenture holders, upon an application by the liquidator in a winding up (*a*).

If the liquidator and the receiver for the debenture holders are different persons, the receiver is *prima facie* entitled to the documents necessary to support the debenture holders' title, and the liquidator to all books and documents which are necessary to enable him to perform his duties, but any order relating to the custody of such books and documents may be varied from time to time as may be expedient (*b*).

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Custody of
books.

SECTION V.—OF LOAN CAPITAL OF OTHER COMPANIES AND STATUTORY SECURITIES.

In order to complete the subject discussed in the present chapter, it is necessary to refer shortly to the borrowed or loan capital (*c*) of companies governed by special Act of Parliament, and, in conclusion, to draw attention to the provisions of the Mortgage Debenture Acts.

The right to raise borrowed or loan capital depends on the principles alluded to in § 1 of the present chapter (*d*). There are,

(*y*) See cases in the last note.

(*z*) *Gosling v. Gaskell* [1897], A. C. 575.

(*a*) *Vimbos, Limited* [1900], 1 Ch. 470.

(*b*) *Engel v. South Metropolitan, &c., Co.* [1892], 1 Ch. 442.

(*c*) As to this use of the word

"capital" see Bk. III., c. 3, § 1.

(*d*) As to Lloyd's Bonds, see *ante*, p. 244, and 3 Seton, 6th ed., p. 2028. As to the statement to be previously sent to the Commissioners of Inland Revenue and the stamp thereon, see *ante*, p. 309.

Borrowed
capital.

Bk. II. Chap. 5. however, several very important statutory enactments relating
 Sect. 5. to the borrowed or loan capitals of companies incorporated by special Acts of Parliament and governed by the Companies (Clauses Consolidation Act, 1845, and these enactments require attention.

8 & 9 Vict. c. 16. By the Companies Clauses Consolidation Act, 1845, railway and other companies governed by it are empowered to raise money by mortgage or bond by the order of a general meeting (e), and the company's uncalled capital may be included in the security (f). But this order is not essential to the validity of the securities issued (g). The bonds or mortgages rank *pari passu* as between their respective holders *inter se*, without reference to their respective dates (h). A register of the bonds and mortgages is required to be kept, and the holders of them are entitled to inspect the register (i). The bonds or mortgages are transferable by deed (k), and the transfer must be registered in order to complete the title of the transferee as between himself and the company (l). The interest on the bonds and mortgages is payable in priority to dividends to shareholders (m). As regards repayment of the principal sum, a day for repayment may be fixed in the bond or mortgage, or no time for repayment may be fixed. If a day for repayment is fixed, the principal sum then becomes a debt for which an action may be brought (n). If no time be fixed the creditor may call in the money twelve months after the date of the bond or mortgage on giving the company six months' notice (o). The company may pay it off on giving a like notice (p). The most effectual remedy for enforcing

(e) 8 & 9 Vict. c. 16, §§ 38, 39, a right, see *ante*, p. 314.
 40. (k) § 46.

(f) §§ 38 and 43; and as to the assignment of a call for payment of debts, see *Pickering v. Ilfracombe Rail. Co.*, L. R. 3 C. P. 235. (l) § 47. See *Doe v. Jones*, 5 Ex. 16; *Lane v. Smith*, 14 Beav. 49.

(g) *Fountaine v. Carmarthen, &c., Rail. Co.*, 5 Eq. 316; *Romford Canal Co.*, 24 Ch. D. 85. (m) § 48.

(h) §§ 42, 44. See *Dowen v. Brecon, &c., Rail. Co.*, 3 Eq. 541, and *ante*, p. 327. (n) § 50. *Price v. Great Western Rail. Co.*, 16 M. & W. 244; *Vertue v. East Anglian Rail. Co.*, 5 Ex. 280, shows that a transferee can sue in his own name. See *infra*, c. 7.

(i) § 45. As to the extent of such (o) § 51.

(p) § 51.

payment is to obtain a receiver (*q*), and if the special Act authorises the mortgagees to apply for a receiver, they can obtain one from two justices of the peace (*r*). Bk. II. Chap. 5.
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The Railway Companies Securities Act, 1866 (*s*), also contains important provisions relating to the registration of persons authorised to issue securities, to rendering accounts of loan capital, and to the endorsement on bonds and mortgages of certain particulars in order to prevent over-issues.

The Railway Companies Act, 1867 (*t*), in most cases protects the rolling stock of railway companies from seizure (*u*), and declares that money borrowed on mortgage bond or debenture stock under any special Act shall have priority over other claims arising after August, 1867, with some few exceptions (*x*).

This Act was passed after the decision of *Gardner v. London, Chatham & Dover Railway Co.* (*y*), which settled that mortgagees of a railway company's "undertaking" are not entitled to any specific charge upon the company's stock or surplus lands, but are only entitled, so long as the company is a going concern, to a receiver of its earnings. The effect of the priority clause just alluded to does not affect this decision; and notwithstanding that clause, a judgment creditor can obtain a sale of the surplus lands and payment out of their proceeds in priority to mortgagees of the company's undertaking (*z*). The clause in fact only comes into operation when there is a receiver of the earnings, when there is a scheme of arrangement, and when the company is being wound up under the Railway Abandonment Act (*a*).

(*q*) *Infra*, c. 7. A bond creditor must first recover judgment.

(*r*) §§ 53 & 54. Mortgage debentures under this Act are not an interest in land within the Mortmain Acts. *Mitchell v. Moberly*, 6 Ch. D. 655; *Holdsworth v. Davenport*, 3 Ch. D. 185; *Chandler v. Howell*, 4 Ch. D. 651; and *Ashton v. Lord Langdale*, 4 De G. & Sm. 402. *Alexander v. Bearne*, 30 Beav. 153; and other cases to the contrary must be considered as overruled, see *Attree v. Hawe*, 9 Ch. D. 337.

(*s*) 29 & 30 Vict. c. 108.

(*t*) 30 & 31 Vict. c. 127.

(*u*) § 4, and see *infra*, c. 7.

(*x*) *Ib.* The exceptions are rent-charges granted under the Lands Clauses Acts, rents payable under leases, claims for lands taken or injuriously affected.

(*y*) 2 Ch. 201. This is the leading case on these securities.

(*z*) *Hull, Barnsley, &c., Rail. Co.*, 40 Ch. D. 119.

(*a*) *Ib.*, and see *infra*, Bk. IV., c. 4.

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Debenture
stock.

Debenture stock is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan. The debenture stock of railway companies and of other companies created by special Act of Parliament and governed by the Companies Clauses Consolidation Act, 1845, is regulated by a variety of statutes of which the principal are the Companies Clauses Acts, 1863 and 1869 (26 & 27 Vict. c. 118, and 32 & 33 Vict. c. 48), the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57). Such stock is irredeemable, the capital cannot be called in and cannot be paid off; it is in effect a right to a perpetual annuity; it is charged on the undertaking and has all the incidents of personal estate and is transferable like other stock of the company; the interest upon it has priority over all interest and dividends on the shares or stock of the company and next to the interest payable on mortgages or bonds previously granted; the holders of the stock issued under the same special Act^(b) have no priority as between themselves; if the interest is in arrear the holders of a prescribed amount of the stock are entitled to a receiver, and any holder may bring an action against the company for interest in arrear^(c). The period of limitations applicable to such actions is twenty years^(d). For further particulars the reader is referred to the statutes.

Debentures, &c.
issued at a
discount.

Companies governed by the Companies Clauses Consolidation Act, 1845, may issue debentures and other securities at a discount^(e).

Mortgage De-
benture Act.

By the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20), facilities are given for the issue, by certain classes of companies, of transferable mortgage

^(b) *Mersey Railway Coy.* [1895], 2 Ch. 287.

Bodman v. Bodman [1891], 3 Ch. 135.

^(c) See 26 & 27 Vict. c. 118, §§ 22-35, and 32 & 33 Vict. c. 48; *Attree v. Hawe*, 9 Ch. D. 337, which decided that such stock was not an interest in land within the Mortmain Acts;

^(d) *Cornwall Minerals Rail. Co.* [1897], 2 Ch. 74.

^(e) *Webb v. Shropshire Rail. Co.* [1893], 3 Ch. 307.

debentures, upon certain terms and conditions. But the Act only applies to (1) companies governed by the Companies Act, 1862, and restricted by the memoranda of association to the objects of advancing money on real securities, and of borrowing money on transferable mortgage debentures, or on real securities (f); (2) to companies incorporated by Act of Parliament for similarly restricted purposes. Moreover the paid-up capitals of these companies must not be less than 100,000*l.*, and each share must be of the nominal value of not less than 50*l.*, of which not less than one-tenth nor more than one-half must have been paid up. The Acts also provide for the deposit at the Land Registry Office of securities held by a company which wishes to avail itself of their provisions. The Court has no power to order such securities to be delivered up to a receiver appointed in a debenture holders' action, or to the liquidator in the winding up of the company, unless they have been redeemed or sold (g).

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Sect. 5.

(f) There is power to alter the memorandum so as to restrict it to these objects where the memorandum as originally framed includes them, but extends to others as well. See § 3.

(g) *Somerset v. Land Securities Co.* [1894], 3 Ch. 464. The Act contains a great variety of other important provisions, to which it is unnecessary to allude in the present place.

CHAPTER VI.

OF THE LIABILITY OF INDIVIDUAL MEMBERS OF COMPANIES TO CREDITORS.

Bk. II. Chap. 6.
Sect. 1.

THE liabilities of directors of companies to their members, the liabilities of members to calls, and their liabilities as contributories in winding-up proceedings will be discussed hereafter in Books III. and IV. In the present chapter it is proposed to examine the separate liability of members of companies to creditors and others apart from all questions as to their liabilities *inter se*, whether before or after a winding-up order. For this purpose it is necessary to distinguish directors from other members; for although what is true of members is also true of directors as members, it frequently happens that directors incur liabilities by their own acts in addition to those to which they are subject simply in their characters as members.

SECTION I.—OF THE LIABILITIES OF DIRECTORS.

1. *For their own acts.*

Torts and
frauds.

It has been already seen that the directors of a company are the agents of the company (a), but they are not the agents of each other, unless clearly so constituted (aa). It has also been seen that directors are responsible for the frauds which they may themselves commit or authorise (b). On similar principles it is conceived that they are personally responsible for any torts which they may themselves commit or direct others to commit, although it may be for the benefit of their company (c).

In a recent case where a company had been formed, and registered under a name calculated to deceive, for the fraudulent

(a) *Ante*, pp. 205 *et seq.*

(aa) See *infra*, pp. 353 *et seq.*

(b) Bk. I., c. 3, § 1 (3).

(c) See *Mill v. Hawker*, L. R. 9

Ex. 309, and 10 ib. 92. As to their liability to third parties for negligence in the performance of their duties, see *ante*, p. 314, note (r).

purpose of obtaining the benefit of another trader's name and reputation, the directors, who were the seven signatories and sole shareholders of the company, were held liable for the fraud, and an injunction was granted to restrain them from allowing the company to remain registered under that name (cc). Bk. II. Chap. 6.
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It was held in a case in which a company infringed a patent, that the directors were personally liable to the costs of a suit to restrain the infringement (d). But it would be contrary to principle to hold directors personally responsible for the negligent or other acts of other servants of the company unless the directors are themselves personally implicated in such acts.

With respect to contracts directors may bind themselves personally, although acting for the company, *e.g.*, by putting their names to bills of exchange or promissory notes so worded as to be their bills or notes and not those of the company (e), or by entering into covenants (f), or other contracts so worded as to bind them individually (g). Such cases turn on the true interpretation of the documents which may be in question. Contracts.

But if a contract is so worded as to bind the company, the directors who sign it are not liable upon it; unless indeed the terms of the contract are such as to bind both them personally and the company, which is sometimes the case (h). This is in accordance with the ordinary rules applicable to contracts with agent (i).

Moreover, a director contracting for a limited company and suppressing the word "limited," is liable personally on the contract (k); and any person contracting on behalf of a registered industrial and provident society without the mention Omission of
word "limited."

(cc) *La Société Anonyme, &c., Levassor v. Panhard Levassor, &c., Co.* [1901], 2 Ch. 513.

(d) See *Betts v. De Vitre*, 5 N. R. 165, and 3 Ch. 441; and see an article in 10 Jur. N. S. (part 2), p. 475.

(e) *Ante*, pp. 279 *et seq.*

(f) See, as to covenants by agents, *Appleton v. Binks*, 5 East, 148; *Hancock v. Hodgson*, 4 Bing. 269; *Hall v. Bainbridge*, 1 Man. & Gr. 42; *Pickering's claim*, 6 Ch. 525.

(g) As in *McCollin v. Gilpin*, 6

Q. B. D. 516, and 5 ib. 390, where three directors promised to pay money advanced to the company on the security of plant, &c., belonging to it, and see *infra*, p. 352.

(h) *Lindus v. Melrose*, 2 H. & N. 293, and 3 ib. 177; *Aggs v. Nicholson*, 1 H. & N. 165; *Russell v. Reece*, 2 Car. & Kir. 669.

(i) See Partn. 202, &c.

(k) 25 & 26 Vict. c. 89, §§ 41 and 42; *Penrose v. Martyr*, E. B. & E. 499. But as to companies not formed for gain, see 30 & 31 Vict. c. 131, § 33.

Bk. II. Chap. 6. of the society's name with the word "limited" at the end of it
Sect. 1. is also personally liable in case of the society's default (l).

Position of agent
who exceeds his
authority.

Formerly it was thought that if an agent entered into a contract on behalf of a principal, and such contract did not bind the principal, he not having authorised it, the agent was himself bound by the contract. According to this doctrine, a contract ostensibly entered into by A. through B. was treated as a contract by B., although it was not the intention of either party to the contract that B. should be in any way bound by it. The propriety of thus making contracts for persons has, however, been very properly questioned and denied; and it is now held that an agent contracting as such without authority, is not bound *by the contract* at all, but that he is liable to the other contracting party in damages for the consequences ensuing from his having assumed to act with an authority which in fact he did not possess. It is also held that he is thus liable although he acted *bonâ fide* and in the belief that he had the authority he assumed (m). But he is under no liability on this ground if the other contracting party either knew that he had not the authority or did not in fact rely on its existence (n).

Warranty of
authority.

This result has been arrived at by the fiction of an implied warranty of authority; but it really is an exception to the general rule that an action will not lie for a misrepresentation unless fraudulent (o).

Personal liability
of directors who
exceed their
powers.

The fiction of an implied warranty of authority is as applicable to directors as to other kinds of agents (p). But with respect to

(l) 56 & 57 Vict. c. 39, § 66 and § 5 (5).

(m) See on this subject the cases referred to in the next twelve notes, and *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Randell v. Trimen*, 18 C. B. 786; *Collen v. Wright*, 7 E. & B. 301, and 8 ib. 647; *Simons v. Patchett*, 7 ib. 568; *Eastwood v. Bain*, 3 H. & N. 738, where the plaintiff had not sustained damage. As to the measure of damages, see *Ex parte Panmure*, 24 Ch. D. 367; *Meek v. Wendt & Co.*, 21 Q. B. D. 126.

(n) *Halbot v. Lens* [1901], 1 Ch. 344.

(o) See *ante*, p. 111, and *Firbank's exors. v. Humphreys*, 18 Q. B. D. 54, and *Halbot v. Lens* [1901], 1 Ch. 344. See, also, Lord Blackburn's observations in *Brownlie v. Campbell*, 5 App. Ca. p. 952, where the difficulty of drawing the line between warranty, fraud, and estoppel is pointed out. See, also Pollock on Contracts, 6th ed., Appendix, note K.; Holmes on the Com. Law, 130.

(p) *Godwin v. Francis*, L. R. 5 C. P. 295; *Ferguson v. Wilson*, 2 Ch. 77.

directors, it must not be forgotten that in most cases the limits of their authority can be readily ascertained, and are supposed to be known (*q*); and a person who deals with directors whom he knows, or is supposed to know, to be exceeding their authority, cannot complain of them if he finds that their acts are repudiated. He runs the risk of such repudiation. In the absence, therefore, of fraud on their part, such a person will be unable to obtain any redress against them. Moreover, they are not liable for honest mistakes as to the legal extent of their authority (*r*).

Thus, where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced (*s*). So where a person bought new preference stock of a railway company which both he and the directors *bonâ fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law (*t*).

But directors, like other agents, impliedly warrant all facts necessary to confer the authority which they profess to exercise. And if the company is governed by a private Act of Parliament the contents and effect of that Act are regarded as matters of fact (*u*). Therefore directors who had accepted bills on behalf of a company, which had no power under its private Acts of Parliament to accept bills, were held liable to the holders who had no notice in fact that the company was not empowered to accept bills (*u*). So where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were held personally liable to repay it (*x*). So where the directors of a benefit building society had power to borrow if a rule

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Liability for
acts *ultra*
vires.

(*q*) See as to this, *ante*, p. 217. *Wilson v. Miers*, 10 C. B. N. S. 348, was an action against directors for exceeding their authority, but the Court was of opinion that there was no excess, and decided against the plaintiff on that ground.

(*r*) *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, and 7 H. L. 102. Compare the cases in the next four notes.

(*s*) *Rashdall v. Ford*, 2 Eq. 750. See on this case, 13 Q. B. D. 363.

(*t*) *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.

(*u*) *West London Commercial Bank v. Kitson*, 12 Q. B. D. 157, and 13 Q. B. D. 360.

(*x*) *Weeks v. Propert*, L. R. 8 C. P. 427; *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696.

Bk. II. Chap. 6. enabling them to do so had been passed, and they borrowed Sect. 1. — money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it (y). So where directors of a company authorised the manager to overdraw the company's account, they were held liable for the over-draft, for although the company had no power to borrow without the consent of a meeting of shareholders, they had power to do so with such consent (z). So where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorised stock. The damages were held to be the value which the stock would have had if it had been authorised (a). If, however, a company by its directors, agrees to issue debentures and has debentures which it can make available for the purposes of the agreement (e.g., by redeeming them from bankers with whom they have been deposited as security), the directors will not be liable if the company does not carry out the agreement (b).

Contracts with promoters of companies.

Further, where a person purports to contract as an agent, and he has in truth no principal, so that the contract, unless binding on the party to it, is wholly void, he is treated as having contracted on his own behalf, and is personally liable accordingly. Thus, if a person contracts on behalf of a company not yet formed, he is liable on that contract; and he is not relieved from such liability by the subsequent adoption of the contract by the company when formed (c); unless the contract is so worded as to exclude personal liability.

Express personal liability.

Again, if directors contract as principals, which is quite consistent with their acting on behalf of the company (d), they

(y) *Richardson v. Williamson*, L. R. 6 Q. B. 276, explained by Mellish, L. J., in 7 Ch. 801.

(z) *Cherry v. Col. Bank of Australasia*, L. R. 3 P. C. 24.

(a) *Firbank's exors. v. Humphreys*, 18 Q. B. D. 54.

(b) *Elkington & Co. v. Hürter* [1892], 2 Ch. 453.

(c) *Kelner v. Baxter*, L. R. 2 C. P.

174; *Scott v. Lord Ebury*, ib. 255.

(d) *McCullin v. Gilpin*, 5 Q. B. D. 390, affirmed 6 Q. B. D. 516; *Dutton v. Marsh*, L. R. 6 Q. B. 361; and the cases on promissory notes, *ante*, pp. 279 *et seq.* See, also, *Kay v. Johnson*, 2 Hem. & M. 118, in which a decree for the specific performance of an agreement for a lease was made against directors personally.

will be bound personally by their contract provided it is not actually illegal. The fact that the contract is one which would not bind the company is not *per se* sufficient to render it void as against the directors personally. Therefore, where the directors of a company disagreed and divided into two parties, and one party retired, and the other party covenanted to indemnify them, this covenant was held binding on the directors who entered into it, irrespectively of the question how far the whole transaction was one which the directors had power to enter into on the part of the company (*e*). But if the contract is illegal no action can be maintained upon it; and therefore where the directors of a railway company agreed that it should pay the expenses which might be incurred by another company in attempting to obtain an Act of Parliament for the formation of a line which, when made, was to be handed over to the first company, it was held that this was an agreement to the effect that the first company should do that which was altogether illegal, and that an action against the directors for a breach of the agreement could not be sustained (*f*).

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2. For the acts of each other.

Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other shareholder. In this respect directors are like promoters, each being answerable for his own acts and for the acts of the others so far as he has made them his agents, but no further (*g*). It must however be borne in mind that the liability here

Directors not the
agents of each
other.

(*e*) *Haddon v. Ayers*, 1 E. & E. 118; *Barker v. Allan*, 5 H. & N. 61.

(*f*) *Macgregor v. Dover and Deal Rail Co.*, 18 Q. B. 618.

(*g*) See *Brown v. Byers*, 16 M. & W. 252; *Herauld v. Leaf*, 5 C. B. 157; *Bramah v. Roberts*, 3 Bing.

N. C. 963; *Lord Lonsborough's case*, 4 De G. M. & G. 411; *Walker's case*, 8 De G. M. & G. 607. See, also, *Weir v. Barnett*, 3 Ex. D. 32 and 238; *Cargill v. Bower*, 10 Ch. D. 502; *Cullerne v. London, &c., Building Society*, 25 Q. B. D. 485.

Bk. II. Chap. 6. referred to is liability to persons dealing with directors as
 Sect. 2. representing their company. The duties and liabilities of
 directors to shareholders will be referred to hereafter in
 Book III.

SECTION II.—OF THE LIABILITIES OF SHAREHOLDERS.

Passing now to the consideration of the personal liabilities of shareholders of companies in respect of transactions which impose liabilities on the companies of which they are members, it is necessary to distinguish one company from another, and especially unincorporated from incorporated companies.

1. *As to the extent of liability.*

a.) *Of liability at Common Law and of attempts to restrict it.*

Attempts to
 limit liability.

By the common law of this country every member of an unincorporated partnership, whether it be an ordinary firm or a joint-stock company with transferable shares, is personally liable for all the debts and engagements of the partnership contracted whilst he is a member of it (*h*). As may be supposed, many attempts have been made from time to time to restrict the application of this rule and to form companies on such terms as to prevent their members from being ruined in the event of the companies suffering serious loss. These various attempts have ceased to be of much practical importance owing to the facilities of forming incorporated companies by means of registration; but they have still great historical interest and deserve notice on that account: moreover, there are still insurance companies which issue policies on the terms that they are to be paid solely out of the funds of the companies.

The attempts referred to may be ranged under two heads, according as there has or has not been some special agreement with the creditors.

Without special
 contract with
 creditors.

So inflexible is the doctrine of unlimited liability, and so

(*h*) Partn., bk. ii., c. 2, § 2, and
 see, as to companies, *Keasley v.*
Codd, 2 Car. & P. 408, note; *Carlen*
v. Drury, 1 V. & B. 157; *R. v.*

Dodd, 9 East, 516; *Robinson's*
Executor's case, 6 De G. M. & G.
 572.

important is it that no doubt shall be cast upon it, that judges have frequently denounced in the strongest terms the conduct of those who have endeavoured to inveigle the public into taking shares in companies by asserting that "no one shall be liable beyond the amount of his subscription." Nothing can be more delusive or worthless than such statements as applied to unincorporated bodies, or to bodies not governed by special Acts of Parliament; for although the subscribers themselves may stipulate with each other for such a restricted liability, nothing is more clear than that, as to the rest of the world, each shareholder is liable for the whole amount of the debts of the company (i). Nor will notice that a stipulation of this kind has been entered into between the shareholders prevent a creditor from holding each of them liable to the full extent of his demand (k).

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Sect. 2.

Notwithstanding, however, this general rule, if a person chooses to deal with a company upon the terms that its funds, and they only, shall be available to make good his demands, he cannot afterwards depart from those terms and hold the members individually liable as if no such restriction had been agreed to (l).

By special contract with creditors.

It is, however, to be borne in mind, that members of unincorporated companies, like other partners who contend for restricted liability, have the *onus probandi* on themselves, and if, owing to any circumstance, they fail in establishing their contention, the general rule of unlimited liability applies to them as a matter of course (m).

The ordinary mode of restricting liability, is to contract that the funds of the company shall alone be liable to the demands against it. Upon contracts in this form, it is to be observed that—

Limiting liability to funds of company.

1. A contract by a person to pay out of his own property

(i) See *R. v. Dodd*, 9 East, 516, and the cases in the last note and the next.

(k) See *Greenwood's case*, 3 De G. M. & G. 459. *The State Fire Ins. Co.*, *Meredith's case*, and *Conver's case*, 1 N. R. 510, V.-C. W.

(l) *Alchorne v. Saville*, 6 Moo.

202; *Halket v. The Merchant Traders' Loan Assoc.*, 13 Q. B. 960; *Hallett v. Dowdall*, 18 Q. B. 2 (the judgment on the bill of exceptions); *Durham's case*, 4 K. & J. 517.

(m) See *Luckombe v. Ashton*, 2 Fos. & Fin. 705, and *ante*, note (k).

Bk. II. Chap. 6. without limitation, is in fact an absolute contract to pay ; for
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— *expressio eorum quæ tacite insunt nihil operatur.*

2. Upon the same principle, a contract by a corporation to pay out of its funds generally is, as regards the corporation, neither more nor less than a contract to pay absolutely ; for a corporation as such has nothing except its funds to pay out of (n). But it has been decided that absence of funds affords no defence to an action against a corporation on a promise to pay (nn).

3. An express contract to pay out of certain specified funds, excludes an implied contract to pay in some other manner (o).

4. But a person who undertakes to pay out of certain funds, is absolutely bound to pay if those funds exist and are available ; so that if, the funds existing and being available, he does not choose to pay out of them, he must pay out of his own property (p).

5. On the other hand, a person who undertakes to pay out of certain funds, is under no obligation to pay unless those funds exist (q), or unless their non-existence is owing to his own default (r), or unless he has also undertaken that they

(n) *Sunderland Marine Insur. Co. v. Kearney*, 16 Q. B. 925, in which the liability of the individual members of the company was not in question.

(nn) *Pallister v. Mayor of Gravesend*, 9 C. B. 774 ; *Payne v. Mayor of Brecon*, 3 H. & N. 572 ; *Lewis v. Mayor of Rochester*, 9 C. B. N. S. 401 ; and *Bush v. Marton*, 2 H. & C. 311. See, too, *Att.-Gen. v. Mayor of Newcastle*, 23 Q. B. D. 492, affirmed *sub nom. Mayor of Newcastle v. Att.-Gen.* [1892], A. C. 568.

(o) See *Alexander v. Worman*, 6 H. & N. 100 ; *Giles v. Smith*, 11 Jur. 334, C. P. ; *Landman v. Entwistle*, 7 Ex. 632 ; *Mathew v. Blackmore*, 1 H. & N. 762 ; *Taft v. Harrison*, 10 Ha. 489. Compare *Cope's case*, 1 Sim. N. S. 54.

(p) *Higgins v. Hopkins*, 3 Ex. 163 ; *Hallett v. Dowdall*, 18 Q. B. 2. But if an incorporated company promises to pay out of its funds only, and it has funds, it does not

follow that the shareholders are personally liable. *Re the Athenæum Society, and Prince of Wales Society*, Johns. 80, affirmed 3 De G. & J. 660.

(q) The Statute of Limitations does not begin to run until they do exist. See *In re Kensington Station Act*, 20 Eq. 197. As to obtaining judgment against a corporation though it has no funds applicable to satisfy the judgment ; see *ante*, note (nn).

(r) As in *McIntyre v. Belcher*, 14 C. B. N. S. 654, where the defendant discontinued the business, out of the profits of which he was to pay the plaintiff. See, also, *Telegraph Despatch Co. v. McLean*, 8 Ch. 658 ; *Worthington v. Sudlow*, 2 B. & Sm. 608. Compare *King v. Accumulative Ass. Co.*, 3 C. B. N. S. 151 ; *Rhodes v. Forwood*, 1 App. Ca. 256 ; *Railway and Electric Appliances Co.*, 38 Ch. D. 597, and other cases noticed *infra*, p. 359, note (e).

shall exist; in which last case his undertaking to pay amounts to an absolute undertaking, and the qualification as to the funds goes for nothing (s). If the fund has been diminished by the proper exercise of powers conferred by an Act of Parliament the loss will fall on the persons to be paid out of the fund (t).

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Sect. 2.

In conformity with these principles, it has been held that the promoters of a company are not liable to persons employed by them upon the terms that such persons shall look for payment to certain specified funds, and not to the promoters individually (u); that upon a contract to pay out of the funds of a joint-stock company, all those who in point of law are bound by the contract, are personally liable to satisfy the demands to which those funds are applicable, if any such funds there be (x); but that if there are no such funds, then the event on which alone payment has to be made not having arisen, no one is liable to pay (y).

Success of
attempt so to
limit liability.

The latter proposition, however, supposes that the contract is not so framed as (notwithstanding what is said about the funds of the company) to amount to an undertaking to pay at all events. The importance of attending to this point appears from *Hancock v. Hodgson* (z). In that case, the projectors of a mining company purchased a copper and tin mine, and covenanted to pay the purchase money by quarterly instalments out of the funds of the company; but it was provided that in case there should not have been received by the bankers

Failure of at-
tempt where
contract is not
clear.

*Hancock v.
Hodgson.*

(s) See *Pilbrow v. Pilbrow's Atmospheric Co.*, 5 C. B. 440.

(t) *Sovereign Life Ass. Co.* [1892], 3 Ch. 279, where under statutory powers the company purchased some of its own shares, thereby in effect reducing its capital.

(u) *Giles v. Smith*, 11 Jur. 334, C. P.; *Landman v. Entwistle*, 7 Ex. 632. Compare *Cope's case*, 1 Sm. N. S. 54; *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101, and *Horsley v. Bell*, ib. in the note; S. C. 2 Am. 770; *Williams v. Hathaway*, 6 Ch. D. 54.

(x) See *Andrews v. Ellison*, 6 B.

Moore, 199; *Gurney v. Rawlins*, 2 M. & W. 87; *Dawson v. Wrench*, 3 Ex. 359; *Reid v. Allan*, 4 Ex. 326; *Hallett v. Dowdall*, 18 Q. B. 2, the judgment on demurrer.

(y) See, in addition to the above cases, *Durham's case*, 4 K. & J. 517; *Halket v. The Merchant Traders' Loan and Insurance Association*, 13 Q. B. 960; *Hassell v. Ditto*, 4 Ex. 525; *The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180; *King v. The Accumulative Assurance Co.*, 3 C. B. N. S. 151; and compare *Cope's case*, 1 Sm. N. S. 54.

(z) 4 Bing. 269.

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of the company or by the directors for the time being, the deposits or instalments due from the several shareholders, so as to enable the directors to pay the purchase money at the times therein before mentioned, then and in such case the said directors shall be allowed a further time to pay such balance, until six months after the time or times when the said quarterly instalments became due. Upon this covenant and proviso it was held, that the covenantors were personally liable to pay the whole purchase moneys, although the company had no funds; for that whatever might have been the case without the proviso, that clearly showed that after the expiration of the further period therein mentioned, the payment was to be made by the covenantors at all events, whether the company had funds or not.

Having made the above general observations, it is necessary to examine with greater particularity the effect of contracts by companies to pay out of particular funds, on

1. The rights of creditors against the funds themselves; and 2. Their rights against the members individually where those funds have been exhausted.

Right against
the funds.

1. With respect to the rights of creditors against the funds, it may now be considered as settled, that a contract by a company to pay a person out of its funds does not give the creditor any specific charge or lien on those funds, nor any preference over other creditors (*a*); but it nevertheless entitles him, even before the time for payment arrives, to prevent the funds from being misapplied (*b*). Where, therefore, an insurance company had issued policies and made them payable out of its funds, a policy holder whose policy had not become payable was held entitled to an injunction to restrain the company from amalgamating with and transferring its funds to another company, such amalgamation and transfer not being warranted by the

(*a*) *Sovereign Life Ass. Co.* [1892], 3 Ch. 279; *Albert Life Ass. Co.*, 9 Eq. 706; *McIver's claim*, 5 Ch. 424, and the cases in the next note.

(*b*) See *Kearns v. Leaf*, 1 Hem. & M. 681; *State Fire Insur. Co.*, ib. 457, and 1 De G. J. & Sm. 634;

Athenæum Life Insurance Society, Johns. 80 and 633, and 3 De G. & J. 660; *Law v. London Indisputable Life Policy Co.*, 1 K. & J. 223. These cases will be adverted to hereafter, when the winding up of companies is being considered.

deed of settlement of the first company (c). It has, however, Bk. II. Chap. 6. Sect. 2. been held (d) that a contract to pay a policy out of particular funds does not amount to a contract to carry on business, nor to a contract not to hand over the funds to other persons (e); and that a policy holder whose policy is not due cannot support an action for damages which he fears he will sustain, but which possibly he will not. The last ground is perhaps the most satisfactory, and has the advantage of rendering the decision in equity consistent with that at law.

It is, however, by no means uncommon for an unlimited insurance company to limit its liability to policy holders and annuitants to its funds, and to have in its deed of settlement or articles of association as originally framed, or as altered in accordance with a power therein contained, power to transfer its funds and its business to another company. Where this occurs, a transfer of the funds cannot be prevented; and upon a proper transfer being made and, in the case of life insurance companies, confirmed by the Court, the policy holders and annuitants cease to have any claims against the transferring company (f). Where the company has power to transfer its funds.

The Life Assurance Companies Acts, 1870 and 1872, make Life Assurance Companies Acts, 1870 and 1872. provision for the deposit of 20,000*l.* by life assurance companies

(c) *Kearns v. Leaf*, 1 Hem. & M. 861; *Aldebert v. Leaf*, ib. Compare *Argus Life Ass. Society*, 39 Ch. D. 571.

(d) *King v. Accumulative Life Assur. Co.*, 3 C. B. N. S. 151. See, also, *Lethbridge v. Adams*, 13 Eq. 547.

(e) See, also, *Rhodes v. Forwood*, 1 App. Ca. 256, where an agent of a colliery contended in vain that his employer was bound to carry it on. In *Re Railway and Electric Appliances Co.*, 38 Ch. D. 597, there was no implied covenant to carry on business in order to work a patent. In *Hamlyn & Co. v. Wood & Co.* [1891], 2 Q. B. 488, there was no implied covenant against voluntarily discontinuing business, and so being unable to continue

to supply grains to the plaintiff; in *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy*, L. R. 3 Ind. App. 200, there was no implied covenant against dissolving a partnership. In *Turner v. Sawdon & Co.* [1901], 2 K. B. 653, there was no implied covenant to give work to the plaintiff. Compare *Telegraph Despatch Co. v. McLean*, 8 Ch. 658, and *McIntyre v. Belcher*, 14 C. B. N. S. 654, noticed *ante*, p. 356, note (r); *Turner v. Goldsmith* [1891], 1 Q. B. 544; and *Brace v. Calder* [1895], 2 Q. B. 253, where covenants to continue the business or the employment of the plaintiff were implied.

(f) See *infra*, pp. 368 *et seq.*; and as to life assurance companies, see the Life Assurance Companies Act, 1870, 33 & 34 Vict. c. 61, § 14.

Bk. II. Chap. 6. established in the United Kingdom, or commencing to carry
Sect. 2. — on the business of life assurance within the United Kingdom after August 9, 1870, the date of the passing of the Act of 1870. This deposit, until returned to the company, forms part of its life assurance fund, and it is not returnable until that fund, accumulated out of premiums, amounts to 40,000*l*. Any company established either before or after the passing of the Act of 1870, which carries on any business besides that of life assurance, must keep separate accounts of its life assurance and annuity business, and all receipts in respect thereof are to be carried to a separate life assurance fund; such fund is appropriated as security for the life policy and annuity holders, and is exempted from liability for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance; but these provisions do not diminish the liability of the life assurance fund for any contracts entered into before the passing of the Act of 1870 (*g*).

Extent of members' liability.

2. With respect to the extent of the liability of the members of a company upon contracts in which it is specially stipulated that the funds of the company alone shall be answerable, and that no member shall be liable beyond the amount of his share, the limit set by contract is the limit of liability:—

a) Where the company is incorporated.

Where the company is an incorporated company, there never was any difficulty in giving effect even at law to all the terms of the contract; and in the case of companies registered under the Act 7 & 8 Vict. c. 110, it was held that the members were not liable to have execution issued against them upon judgments obtained against the company on a contract of the description in question; but that the property of the company was alone liable to make good the demands of the judgment creditor; and this was held at law even in cases where the subscribed capital had been exhausted but the whole capital had not been paid up (*h*).

(*g*) 33 & 34 Vict. c. 61, §§ 3 and 4, and 35 & 36 Vict. c. 41, §§ 1 and 2, and *ante*, p. 177 *et seq*.

(*h*) *Halket v. The Merchant Traders' Loun and Insurance Assoc.*, 13 Q. B. 960; *Hassell v. The Same*,

4 Ex. 525; *Durham's case*, 4 K. & J. 517; *Re the Athenæum Life Soc.*, Johns. 80, and 3 De G. & J. 660, on appeal; *Lethbridge v. Adams*, 13 Eq. 547.

The same principle was acted on in equity, except that Bk. II. Chap. 6. Sect. 2. a Court of equity compelled the shareholders to pay up rateably so much of the capital as had not already been subscribed (i). This can now be done by a properly constituted action.

If the capital of the company has in effect been reduced by the purchase by the company under statutory powers of its own shares, which were but partially paid up, the shareholders are not liable to make good the amount unpaid on the purchased shares for the benefit of creditors whose rights are limited to payment out of the funds of the company (k).

In all these cases, however, it must be borne in mind that the liabilities which are limited to the funds of the company, are those only which are expressly so limited by the contracts with the creditors; the liabilities to other persons are unlimited (l).

Companies governed by the Companies Act, 1862, may, Companies governed by the Act of 1862. although unlimited, limit their liability by special contract (m), and where they do so the principles above adverted to will be applicable. But as under the Companies Act, 1862, judgments against a company cannot be enforced against its members, questions as to their individual liability can scarcely arise except when a company is being wound up.

As regards unincorporated companies, it was extremely b) Where the company is not incorporated. difficult, if not impossible, before the passing of the Judicature Acts, to enforce by action at law a contract limiting their liability to their funds (n). It was practically necessary to sue in equity. But now it is apprehended that an action can be maintained against the persons having the control of the funds

(i) *Talbot's case*, 5 De G. & Sm. 386; *Durham's case*, 4 K. & J. 517; *Evans v. Coventry*, 8 De G. M. & G. 835. See clause 7 of the decree.

(k) *Sovereign Life Ass. Co.* [1892], 3 Ch. 279. Note that the liability of the shareholders was unlimited.

(l) See the *Albert Life Ass. Co.*, 9 Eq. 706; *Professional Life Ass. Co.*, 3 Eq. 668, and 3 Ch. 167; *Lethbridge v. Adams*, 13 Eq. 547.

(m) See § 38, cl. 6, *Accidental*

Death Ins. Co., 7 Ch. D. 568.

(n) See *Hallett v. Dowdall*, 18 Q. B. 2, and the observations of Melish, L. J., in *Grain's case*, 1 Ch. D. 322; *Alchorne v. Saville*, 6 B. Moore, 202, note. *Hallett v. Dowdall* was noticed at length in the 3rd and earlier editions of this treatise, but it has not been thought necessary to reproduce the former observations on it.

Bk. II. Chap. 6. and the persons liable to contribute to them, to enforce the
Sect. 2. — liability to contribute, and the due application of the funds
 when raised (o).

b.) Of limited liability by Statute.

Limited liability
by statute.

Passing now to the subject of limited liability by statute, the first point which has to be borne in mind is that the moment a society of any kind is incorporated, its members cease by common law to be in any way liable for the debts and engagements of the body corporate (p). Moreover, although by common law it has always been lawful for the Crown to create corporations, the Crown has no power by common law to create a corporation, and at the same time to render its members individually liable for its debts (q). The whole of that branch of the law which relates to the liability, as distinguished from the non-liability, of the members of incorporated companies for the debts and engagements of such companies, is of modern growth and is based upon statutory enactments. These enactments will be examined hereafter in connection with the subjects of execution and winding up, but it may be useful to state generally in the present place that—

Chartered com-
panies.

1. The liability of the members of a company governed by the Letters Patent Act depends on the terms of its charter or letters patent, the Crown being empowered by the Act in question to limit their liability or not. (See 7 Will. 4 & 1 Vict. c. 73, §§ 4 and 29.)

Companies go-
verned by 8 & 9
Vict. c. 16.

2. The liability of the members of a company governed by the Companies Clauses Consolidation Act is limited to the extent of their unpaid-up shares in the capital of the company (8 & 9 Vict. c. 16, § 36).

(o) See *Law v. The London In-
disputable Life Policy Co.*, 1 K. &
J. 223; *Talbot's case*, 5 De G. & Sm.
386; *Durham's case*, 4 K. & J. 517;
Robson v. McCreight, 25 Beav. 272;
Evans v. Coventry, 8 De G. M. &
G. 835. See, as to the effect of a
transfer by the company of its
business, *Hort's case*, 1 Ch. D. 307.

South Yorks. Bldg. Socy., 22 Q. B.
D. p. 476.

(q) See *Elve v. Boyton* [1891],
1 Ch. 501. This power was con-
ferred upon the Crown by 6 Geo. 4,
c. 91, § 2, which was followed by
4 & 5 Will. 4, c. 94, and was with
it repealed and replaced by 7 Will.
4 & 1 Vict. c. 73.

(p) See per Cave, J., *Sheffield v.*

3. The liability of the members of a company empowered by a special Act of Parliament to sue and be sued by a public officer depends on the terms of such Act, but will almost invariably be found to be unlimited (*r*). Bk. II. Chap. 6.
Sect. 2.
Companies empowered to sue and be sued.

4. The liability of the members of a banking company governed by 7 Geo. 4, c. 46, is unlimited. (See 7 Geo. 4, c. 46, §§ 11, 12, 13.) Banking companies governed by 7 Geo. 4, c. 46.

5. Subject to the exceptions presently to be noticed, the extent of the liability of the members of a company formed and registered under the Companies Act, 1862, depends upon whether the company is registered with limited liability or not. If the company is registered with limited liability, its members are not liable beyond the amount for which they have undertaken to be responsible; but if the company is not so registered, its members are liable to the full amount of the company's debts and engagements, whatever that may be (*s*). The liability, however, of each member is merely a liability to contribute with others; and such liability can only be enforced by winding up the company. No execution can issue against a member upon a judgment obtained against a company. Companies Act, 1862.

The exceptions above referred to are as follows:—

(1.) Even if the company is registered with limited liability, the liability of the directors will be unlimited if the memorandum of association so provides (*t*). Exceptional liabilities.

(2.) If a company carries on business for six months with less than seven members, all the members cognisant of the fact are severally liable for the debts contracted by the company during that time, and may be sued accordingly (*u*).

(3.) The Act contains stringent provisions to compel limited companies and their officers to use the word "limited" as part of the name of the company in matters relating to its business (*x*); and persons signing or authorising the signature on

(*r*) See *Aldridge v. Cato*, L. R. 4 P. C. 313, as to the liability of a member of a company empowered to sue and be sued, but not incorporated. The Colonial ordinance in that case was held not to have incorporated the company, and the case may be usefully referred to on

the construction of such documents.

(*s*) See 25 & 26 Vict. c. 89, § 38.

(*t*) 30 & 31 Vict. c. 131, §§ 4 and 5.

(*u*) 25 & 26 Vict. c. 89, § 48.

(*x*) §§ 41 and 42. If the company is formed for the promotion of art, science, &c., or other useful

Bk. II. Chap. 6. behalf of such a company of any bill of exchange, promissory
Sect. 2.

— note, cheque, or order for money or goods, in which the word limited is not used as directed, are themselves liable for the amount, unless the same is duly paid by the company (y).

(4.) The liability of limited banking companies issuing notes is unlimited in respect of such notes (z).

(5.) Although a company may be registered without limited liability, the liability of its members may be limited by special contract (a).

Companies regis-
tered but not
formed under
the Act of 1862.

(6.) The liability of the members of companies not formed under the Act but registered under it, is as to all matters occurring after registration the same as the liability of members of companies formed and registered under the Act. But as to other matters the extent of liability is the same as if no registration had taken place (b). Existing companies with unlimited liability, whether registered as such under the Act of 1862 or not, may be registered as limited companies, and if so registered, the liability of their members as to matters occurring after registration becomes limited also (c). But banking companies existing at the date of the passing of the Act and registering under it as limited companies, are bound to give certain notices to their customers before the privilege of limited liability can be claimed as against them (d).

As to the liabilities of members of registered industrial and provident societies and building societies, see the Appendices II. and III.

object and not for gain, the Board of Trade may, on such conditions as it thinks fit, grant a licence dispensing with the use of the word "limited." 30 & 31 Vict. c. 131, § 23. See the section.

(y) 25 & 26 Vict. c. 89, § 42. See *Penrose v. Martyr*, E. B. & E. 499.

(z) 42 & 43 Vict. c. 76, § 6.

(a) 25 & 26 Vict. c. 89, § 38, cl. 6.

(b) See §§ 179 and 196, cl. 5.
The liability under the repealed

Act of 7 & 8 Vict. c. 110, was unlimited; see § 25. So was the liability under the repealed Act, 7 & 8 Vict. c. 113; see § 7. The liability under the Acts of 1856 and 1857 was substantially the same as that under the Companies Act, 1862.

(c) See §§ 179, 180, and 42 & 43 Vict. c. 76, §§ 4 and 5.

(d) See § 188.

2. *As to the duration of liability.*Bk. II. Chap. 6.
Sect. 2.(a.) *Commencement of liability.*

In ordinary partnerships a person who joins a firm does not become liable to its existing creditors simply by the act of joining it, although he may have been admitted into partnership upon the terms that as between him and his co-partners he shall contribute to the existing debts of the firm (e). The same rule applies to the members of unincorporated companies when there is no statutory provision to the contrary. Therefore, where a creditor sued a shareholder in a cost-book mining company for goods supplied to the company before the defendant became a shareholder, the creditor was held not entitled to recover (f).

When, however, a person takes shares in a company, he, as between himself and other shareholders, takes those shares with all the rights and liabilities attaching to them, so that his co-shareholders have a perfect right to insist upon his contributing with them towards the liquidation of debts contracted before he joined the company (g). And even as regards creditors, the liability of a shareholder to them seldom depends upon the ordinary principles of partnership law; for most companies are governed by statutory enactments, which must not be overlooked. These enactments will be examined hereafter, but it may be stated generally, that in all companies regulated by 7 Geo. 4, c. 46, by 8 & 9 Vict. c. 16, or by the Companies Act, 1862, an incoming shareholder is, so long as he remains a shareholder, liable to creditors in respect of debts incurred by the company before he became a shareholder (h). The Letters Patent Act (7 Will. 4 & 1 Vict. c. 73, § 24) is so worded as to be capable of receiving a different construction

(e) Partn., bk. ii., c. 2, § 3, p. 210
et seq.

(f) *Thomas v. Clarke*, 18 C. B. 662. See, too, *Thomas v. Hobler*, 4 De G. F. & J. 199.

(g) *Taylor v. Ifill*, 1 N. R. 566, V.-C. W.; *Cape's Executor's case*, 2 De G. M. & G. 562; *Mayhew's case*, 5 ib. 837. See, too, *Horsley v. Bell*, 1 Bro. C. C. 101, note. *Sanderson's*

case, 3 De G. & S. 66, *contra*, cannot be regarded as correct on this point. See *Henderson v. Sanderson*, 3 H. L. C. 698.

(h) The same was true of companies governed by the repealed Acts, 7 & 8 Vict. cc. 110 and 113, and the Joint Stock Companies Acts, 1856 and 1857.

Bk. II. Chap. 6. in this respect; but probably a different construction would
 Sect. 2. — not be put upon it; for it would be highly inconvenient to apply
 different principles to different companies if it can be avoided,
 and there certainly is no sufficient reason for any distinction
 between them with reference to the liability alluded to (i).

(b.) *Termination of liability.*

1. Termination
 of shareholders'
 liability in re-
 spect of future
 Acts.

It would seem that a member of an ordinary partnership cannot revoke his co-partner's authority to bind him during the continuance of the partnership unless he is in a position to dissolve the firm (k).

As the directors of an incorporated company are the agents of the company, and not of the individual members, a notice by a member to the effect that he will not be responsible for the future acts of its directors, would, it is conceived, be simply inoperative. As regards incorporated companies, the only mode in which a shareholder can escape liability for future acts of the directors is by duly severing his connection with the company.

Effect of continu-
 ing on register.

When a shareholder ceases to be such, he obviously determines the authority conferred by himself upon the company and its agents to bind him. If he is a shareholder in a company which has no register of its members accessible to the public, he is in the position of a dormant partner, and consequently he cannot be made liable for what occurs after his retirement; and no notice of retirement is necessary except to those who knew him to be a shareholder (l). But a person who is a shareholder in a company which has a register of its members accessible to the public, is *primâ facie* in a different position; and reasoning from analogy, a retiring shareholder ought in such a case to take care to have his name removed from the register, for so long as it is there he holds himself out as a shareholder (m). But here, as in other cases, the

Statutes must
 be looked to.

(i) This point was apparently intended to be raised in *Philipson v. Egremont*, 6 Q. B. 587, but it was not decided.

(k) Partn., bk. ii., c. 2, § 3, p. 218 *et seq.*

(l) See, Acc. *Northey v. Johnson*, 19 L. T. 104, the case of a share-

holder in a cost-book mine.

(m) This is consistent with the cases which show that a person whose name is put on a register of shareholders without his authority does not hold himself out as a shareholder. See *Lyster's case*, 4 Eq. 233; *Birch's case*, 2 De G. & J.

liability of shareholders turns on the statutes applicable to the companies in which they are shareholders, and reliance must not be placed upon the general principles applicable to partnerships. Bk. II. Chap. 6.
Sect. 2.

The Letters Patent Act expressly enacts that a person ceasing to be a shareholder in a company to which that Act applies, shall for all purposes of liability be considered as a continuing shareholder until the fact that he is not so has been registered (*n*). But as regards companies governed by other statutes, it will be found that their liability for future debts depends not so much on what appears from the company's register, as on the fact of membership, of which the register is only *prima facie* evidence (*o*).

Again, with respect to the liability of a late shareholder in a company for those debts and engagements of the company to which he was liable when he was a shareholder, it is necessary to consult the statute or charter by which the company in question is governed. Without referring to particular enactments at length, it may be stated generally that the ordinary principles of partnership and corporation law have not been materially departed from in the case of companies, except as regards time (*p*). 2. Termination
of shareholders'
liability in re-
spect of past
Acts.

The Joint-stock Banking Act, 7 Geo. 4, c. 46, § 13, contains provisions continuing the liability of shareholders in respect of past debts until the lapse of three years after they have ceased to be shareholders (*q*). Summary of
Acts.

The Letters Patent Act, 7 Will. 4 & 1 Vict. c. 73, § 24, continues the liabilities of late shareholders, but it does not contain any provision limiting the duration of such liabilities.

10; *Lofthouse's case*, ib. 69; *Powis v. Butler*, 4 C. B. N. S. 469, affirming S. C., 3 ib. 645. See, also, *Partn.*, pp. 65 *et seq.*

(*n*) 7 Will. 4 & 1 Vict. c. 73, § 21.

(*o*) See the section in the next chapter on Execution against Companies and their Shareholders.

(*p*) See, as to partners, *Part.*, bk. ii., c. 2, § 3, pp. 231 *et seq.*

(*q*) The repealed Acts, 7 & 8 Vict.

c. 110, § 66; c. 113, § 10; and 19 & 20 Vict. c. 47, § 62, as to unlimited companies, contained similar provisions. But the 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 110, and c. 113, only render a late shareholder liable for debts contracted whilst he was a shareholder. The Act of 1856 rendered him liable for debts contracted before he became a shareholder, and whilst he continued to be so.

Bk. II. Chap. 6.
Sect. 2.

The Companies Clauses Consolidation Act contains no provision continuing the liability of a shareholder, after he has ceased to be such (8 & 9 Vict. c. 16, § 86).

The liability of shareholders in a company formed under the Companies Act, 1862, is continued in the case of a winding up, as to debts contracted before their retirement, for one year after they have ceased to hold shares (25 & 26 Vict. c. 89, § 38).

The Industrial and Provident Societies Act, 1893, contains a similar provision (56 & 57 Vict. c. 39, § 60).

Liability to contribute not to be confounded with liability to creditors.

The liability of a retired shareholder to contribute to the debts of a company must not be confounded with his liability to creditors. For notwithstanding the continuance of his liability to creditors, he may be entitled to a complete indemnity from the other shareholders, and may not therefore be a contributory with them, and this is a common case. On the other hand, a shareholder may be freed from liability to creditors, but not be freed from liability to the other shareholders, to contribute with them to the payment of debts for which they only are directly liable. This, although not so common a case as the other, is still a possible case, and affords a striking illustration of the difference (constantly lost sight of by non-lawyers) between direct and indirect liability to the debts of a company (*r*). This subject will be examined hereafter.

3. *On the commencement and termination of liability in the case of amalgamating companies.*

Commencement of liability.

The position of a company which amalgamates with another by agreement is analogous to that of a man who enters into partnership with another. As the two partners do not become jointly liable to their respective separate creditors, and neither partner becomes liable to the debts of his co-partner, so the two companies do not become jointly liable for each other's engagements, nor do the shareholders in the one company become debtors to the creditors of the other company. If the agreement to amalgamate is valid, it will bind the two companies as between themselves; but such an agreement will not

(*r*) See *Ex parte Gouthwaite*, 3 Mac. & G. 187.

per se give the creditors of either any *locus standi* against the other: and if the agreement to amalgamate is *ultra vires* and invalid as between the two companies, securities given by one company in respect of the debts of the other will be invalid also (s). Bk. II. Chap. 6.
Sect. 2.

Where companies are amalgamated by statute, special provision is always made with respect to these matters.

The principle of *Edwards v. The Grand Junction Railway Co.* (t) applies to the case of two companies amalgamating. The amalgamating company will not be allowed to exercise powers acquired by means of agreements with its component companies or their projectors, except upon the terms of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by if it had entered into them (u).

Partners cannot get rid of their liabilities to creditors by retiring from the firm (x); and it is wholly immaterial whether all retire, so as to put an end to the firm altogether, or whether some only retire; the principle in each case being that a creditor is not affected by agreements come to between his debtors. Precisely the same principle renders it impossible for the members of a company to get rid of their liabilities as between themselves and their creditors, by simply agreeing to dissolve, or by transferring their rights and (so far as they can) their liabilities to some other company. Although, therefore, a company may have transferred all its assets and liabilities Termination of
liability.

Amalgamating
companies.

(s) See Partn. pp. 246 *et seq.*, the *Era Ass. Co.*, 2 J. & H. 400, and the *Saxon Assurance Society*, 2 J. & H. 408, and *Ernest v. Nicholls*, 6 H. L. C. 401. As to the effect of amalgamation in discharging sureties, see *The Eastern Union Rail. Co. v. Cockrane*, 9 Ex. 197, and *The London, Brighton and South Coast Rail. Co. v. Goodwin*, 3 Ex. 320. In these cases the surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject.

(t) *Ante*, p. 200.

(u) See *The Earl of Lindsey v. Great Northern Rail. Co.*, 10 Ha. 664; *Preston v. Liverpool and Manchester Rail. Co.*, 1 Sim. N. S. 586, on demurrer; *Stanley v. Chester and Birkenhead Rail. Co.*, 9 Sim. 264, and 3 M. & Cr. 773. See, also, *Port of London Assur. Co.'s case*, 5 De G. M. & G. 465, reversed in 6 H. L. C. 401, *sub nom. Ernest v. Nicholls*, on the ground that the amalgamation was altogether invalid.

(x) Partn. pp. 231 *et seq.*

Bk. II. Chap. 6.
Sect. 2.

Position of
policy-holders.

to another company, the transferring company will still remain liable to those of its creditors who have not expressly or impliedly released it from their claims (y). What amounts to an implied release is often very difficult to determine; nor are all the cases on the subject easy to reconcile (z).

In the first place, holders of policies of insurance must not be confounded with ordinary creditors. The holder of a subsisting policy is not a creditor at all; and in order that he may become a creditor of the company which issued the policy, he must keep up his policy with the company, and the event insured against must happen whilst the policy is so kept up. Consequently it was held in many cases that if an insurance office had transferred its business to another company, a holder of a policy who had notice of the transfer and who paid his future premium to the new office, ought to be treated as having agreed to accept the new office in lieu of the old; and unless this inference could be rebutted he was held to have discharged the old office. The following cases illustrate this:—

A. Original company held to be discharged.

- (a) The original having had, by its deed of settlement, express power to transfer its business, and the policies having been issued subject to this power.

Hort's case, 1 Ch. D. 307.

Grain's case, ib.

Harman's case, ib. 326.

Cocker's case, 3 Ch. D. 1.

Dowse's case, ib. 384. A case of an annuity.

- (b) The policy holder having accepted the new office after notice of the transfer.

National Provincial Life Ass. Soc., 9 Eq. 306.

International, &c., Life Ass. Soc., 9 Eq. 316.

(y) See, in addition to the cases cited below, *Hardinge v. Webster*, 1 Dr. & Sm. 101, in which the creditor was a member of the transferring company, and the defendant was a member of both companies. There is an express enactment to this effect in the Industrial Provident Societies Act, 1893, 56 & 57 Vict. c. 39, § 57.

(z) As pointed out by Lord Hatherley in *Re The Family Endowment Soc.*, 5 Ch. 118, see p. 133, clear proof is required to show that a person having a claim against one company on a written contract has abandoned it for a claim against another company which it may be difficult to prove.

Merchants' and Tradesmen's Ass. Soc., 9 Eq. 694. Bk. II. Chap. 6.
Times Life Ass. Soc., 5 Ch. 381. Sect. 2.
Anchor Ass. Co., 5 Ch. 632.
Spencer's case, 6 Ch. 362.
Fleming's case, 6 Ch. 393.
Evens' claim, 16 Eq. 354.
Miller's case, 3 Ch. D. 391.

B. Original company held not to be discharged.

- (a) The policy-holder having had no sufficient notice of the transfer.

Manchester and London Life Ass., 9 Eq. 643, and
 5 Ch. 640.

Conquest's case, 1 Ch. 334.

- (b) The policy-holder having refused to accept the new company
Griffith's case, 6 Ch. 374.

In order, however, to remove the difficulty of determining in these cases whether a policy-holder has or has not released the old office, it has been enacted by 35 & 36 Vict. c. 41, § 7, as follows :—

§ 7. Where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company, who shall pay to the other company the premiums accruing due in respect of his policy, shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised.

But even in the case of policy-holders who have apparently accepted the new office, in lieu of the old, if it should appear that the amalgamation was *ultra vires* so that the new company is not liable to pay the policy, the old office will not be discharged (a).

As regards persons who are actually creditors of the transferring company, they are not held to have released their original debtor simply by receiving payments from the new Actual creditors.

(a) See *Re Saxon Life Assurance Society*; *The Anchor's case*, 2 J. & H. 408, and on appeal, 1 De G. J. & Sm. 29.

Bk. II. Chap. 6.
Sect. 2.

company and giving receipts to it (b); there must be some clear and distinct agreement to accept the new company as the debtor in lieu of the old; and where an annuitant who knew of the amalgamation had done nothing more than for several years receive his annuity from the new company and give receipts to it, the Court held that he had not ceased to be a creditor of the old company (c). But creditors whose claims are limited to the funds of a company which has power to transfer those funds and its business, lose their rights against the company after it has transferred its funds and business to another (d).

33 & 34 Vict.
c. 61.

The amalgamation of Life Insurance Companies is now regulated by 33 & 34 Vict. c. 61, § 14, which prohibits amalgamation otherwise than by an order of the High Court to be obtained as there mentioned (e).

(b) *India and London Life Ass. Co.*, 7 Ch. 651, a case of an annuitant; *Commercial Bank Corp. of India and the East*, 16 W. R. 958, where there was no sufficient notice of the transfer of the business; and see *Ex parte Gibson*, 4 Ch. 662, where there was notice, but a

refusal to accept the new company.

(c) *Family Endowment Society*, 5 Ch. 118; *Nat. Prov. Life Ass. Soc.*, 9 Eq. 306.

(d) *Dowse's case*, 3 Ch. D. 384.

(e) See *Re Argus Life Ins. Co.*, 39 Ch. D. 571.

CHAPTER VII.

OF ACTIONS BETWEEN COMPANIES AND NON-MEMBERS.

IN order to complete the subjects discussed in the preceding chapters it is necessary to examine the remedies by which the obligations and liabilities already alluded to can be enforced.

Bk. II. Chap. 7.
Sect. 1.
General observations.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are actions, defences by way of set-off, proceedings to enforce judgments, and proceedings to wind up companies. The subject of winding up will be discussed hereafter, and the present chapter will be confined to actions other than debenture holders' actions, which have been already discussed (pp. 331 *et seq.*), set-off, and execution.

SECTION I.—ACTIONS BY AND AGAINST COMPANIES.

1. *Incorporated companies.*

An incorporated company, whether it is incorporated by charter, special Act of Parliament, or registration, must sue and be sued by its corporate name (a); and as a general rule an incorporated company cannot sue or be sued in respect of any contract entered into or act done prior to its incorporation (b). But to this rule there are statutory exceptions, and by the Companies Act, 1862, a company formed before November, 1862, but registered under the Act, may apparently

Actions by
and against
incorporated
companies.

In respect of
matters before
incorporation.

(a) See *Re Hodges*, 8 Ch. 204; *Fell v. Burchett*, 7 E. & B. 537, where a shareholder in a registered company was unsuccessfully sued. Compare *Barton v. Hutchinson*, 2 Car. & K. 712. The company should be sued in its corporate name simply. *Pilbrow v. Pilbrow's Atmospheric Rail. Co.*, 3 C. B. 730.

But see 16 & 17 Vict. c. 112, § 21, which enables any incorporated literary and scientific institutions which are not entitled to sue or be sued by their corporate name to sue or be sued in the name of an officer appointed in that behalf.

(b) See *ante*, p. 196, and the next note.

Bk. II. Chap. 7, sue and be sued in its corporate name in respect of such
Sect. 1.

- matters as it might have sued or have been sued for if no registration had taken place (c). Moreover, if an unregistered society, formed after 1862, subsequently registers itself under the Companies Acts and so becomes incorporated, the incorporated company may bring an action on a contract entered into with the society if, after the incorporation, there has been an agreement express or implied between the company and the other party to the contract that the company shall be substituted for the society (cc).

Actions by and
against com-
panies being
wound up.

The law relating to actions by and against companies which are being wound up, will be examined in that portion of the treatise which relates to the winding up of companies; but it may be observed here generally, that when a company registered under the Companies Act, 1862, is being wound up, actions, whether by or against it, must be brought in its registered name (d), and not as under the Winding-up Acts of 1848-9, in the name of the official manager or liquidator (e).

Service of writ.

In the absence of any statutory provisions regulating service of process, every writ of summons issued against a corporation aggregate may be served on the head officer or on the clerk, treasurer, or secretary of such corporation (f). For service on a clerk to be good, the clerk must be in the nature of a head officer or secretary, whose knowledge would be that of

(c) This it is conceived is the general effect of 25 & 26 Vict. c. 89, §§ 193-195. In *Hull Flax Co. v. Wellesley*, 6 H. & N. 38, calls made before registration were sued for afterwards in the company's registered name, and were recovered. So in *Queensbury Industrial Society v. Pickles*, L. R. 1 Ex. 1, where a society registered under 25 & 26 Vict. c. 87, recovered in its registered name a debt owing to it before registration; and compare that case with *Dean v. Mellard*, 15 C. B. N. S. 19, and *Linton v. Blakeney Industrial Society*, 3 H. & C. 853, where societies registered under the same Act

were held not liable to be sued in their registered names in respect of debts contracted before registration. The only general conclusion to be drawn from these cases is that the exact language of each Act must be closely attended to. See, further, *Lanyon v. Smith*, 3 Best & Sm. 938.

(cc) *Ex parte Poppleton*, 14 Q. B. D. 379. As to actions after amalgamation, see *infra*, p. 378.

(d) 25 & 26 Vict. c. 89, § 95.

(e) 11 & 12 Vict. c. 45, § 50, *et seq.* There were, however, some cases in which he could not sue. See, as to this, *Re Weiss*, 15 C. B. 331; *Russell v. Croysdill*, 11 Ex. 123.

(f) R. S. C., Order ix. r. 8.

the corporation (*g*). Service on the clerk of a mere agent of the corporation will not be sufficient (*h*). Bk. II. Chap. 7.
Sect. 1.

This rule is applicable to foreign corporations carrying on business and having an office in this country in such a manner as to constitute residence here (*i*). A foreign corporation which is not so resident here may be sued in the same way as an individual foreigner resident out of the jurisdiction, and leave to issue a writ and to serve notice of it out of the jurisdiction will be given in a proper case (*k*). Foreign
corporations.

The parties may agree to accept service in a way not in accordance with the rules (*l*).

If, however, by any statute provision is made for service of the writ upon the corporation, the writ may be served in accordance therewith (*ll*).

By the Companies Act, 1862, a writ of summons may be served by leaving it, or sending it through the post in a pre-paid letter addressed to the company, at its registered office (*m*). The Companies
Act, 1862.

By the Companies Clauses Consolidation Act, 1845, a writ of summons may be served by being left at or transmitted through the post to the principal office of the company, or one of the principal offices where there are more than one, or being given personally to the secretary, or, if there be no secretary, to any one director of the company (*n*). Companies
Clauses Con-
solidation Act.

(*g*) See under the repealed § 16 of the Common Law Procedure Act, 1852, *Wulton v. Universal, &c.*, Co., 16 M. & W. 438; *Mackereth v. Glasgow Rail. Co.*, 8 Ex. 151.

(*h*) *The Princess Clementine* [1897], P. 18.

(*i*) See, where the corporation was held to be resident in this country, *La Bourgogne* [1899], A. C. 431, affirming [1899], P. 1; *Huggin v. Comptoir D'Escompte de Paris*, 23 Q. B. D. 519; *Lhoneux v. Hong Kong, &c., Co.*, 33 Ch. D. 446; *Newby v. Van Oppen*, L. R. 7 Q. B. 293. And where it was not, *Badcock v. Cumberland, &c., Co.* [1893], 1 Ch. 362; and *The Princess Clementine* [1897], P. 18, where there was only an agency here.

(*k*) *Scott v. Royal Wax Candle Co.*, 1 Q. B. D. 404; *Westman v. Aktiobolaget, &c., Fabrik*, 1 Ex. D. 237, and R. S. C., Order xi.

(*l*) *Montgomery, Jones & Co. v. Liebenthal & Co.* [1898], 1 Q. B. 487; *Tharsis Sulphur Co. v. Société, &c., des Métaux*, 58 L. J. (Q. B.) 435.

(*ll*) R. S. C., Order ix. r. 8.

(*m*) § 62. As to proving service, see § 63.

(*n*) 8 & 9 Vict. c. 16, § 135, and § 137 of the Scotch Act, 8 & 9 Vict. c. 17. "Principal office" means an office where the general superintendence of the business is carried on. *Garton v. G. W. Ry.*, E. B. & E. 837; and *Palmer v. Caledonian Rail. Co.* [1892], 1 Q. B. 823.

Bk. II. Chap. 7. The Lands Clauses Consolidation Act, 1845 (*o*), and the Rail-
 Sect. 1. way Clauses Consolidation Act, 1845 (*p*), and the corresponding
 Scotch Acts, contain provisions of a similar nature for service
 on the promoters of undertakings governed by those Acts.

Scotch and
 Irish companies.

A company registered under the Companies Act, 1862, in Scotland or Ireland (*q*), or a Scotch or Irish company governed by the Companies Clauses Consolidation Act (*r*), or other Act having similar provisions, must be served in Scotland or Ireland in accordance with the statutory provisions applicable thereto, and cannot, it seems, even if carrying on business in this country, be sued and served in this country with a writ as if it were a foreign corporation. In a proper case leave may be obtained to serve such a company out of the jurisdiction (*s*).

Security for costs
 when company
 sues.

A foreign company (*t*), and also a limited company, if there is reason to suppose that its assets will be insufficient to pay the defendant's costs, can be compelled to give security for the costs of actions instituted by it (*u*). But the section of the Companies Act in question has not altered the practice with regard to cross actions. If the company, though nominally the plaintiff in the cross action, is really in the position of a defendant, security for costs will not as a rule be ordered (*x*); but such security may be ordered if the action or counterclaim is not purely of the nature of a cross action (*y*). An affidavit, showing reasonable ground for supposing that the company cannot pay the costs, will, if unanswered, induce the Court to

(*o*) 8 & 9 Vict. c. 18, § 134, and
 § 128 of the Scotch Act, 8 & 9 Vict.
 c. 19.

(*p*) 8 & 9 Vict. c. 20, § 138, and
 § 130 of the Scotch Act, 8 & 9 Vict.
 c. 33.

(*q*) *Watkins v. Scottish Imperial
 Ins. Co.*, 23 Q. B. D. 285.

(*r*) *Jones v. Scottish Accident Ins.
 Co.*, 17 Q. B. D. 421. Where a
 Scotch railway company had a short
 line to Carlisle, and for the purpose
 of that line had incorporated the
 English Companies Clauses Acts,
 service at their office in Carlisle was
 held bad. *Palmer v. Caledonian
 Rail. Co.* [1892], 1 Q. B. 823.

(*s*) *Re Burland's Trade Mark*, 41
 Ch. D. 542.

(*t*) *Kilkenny, &c., Rail. Co. v.
 Fielden*, 6 Ex. 81; *Limerick, &c.,
 Rail. Co. v. Fraser*, 4 Bing. 394.

(*u*) 25 & 26 Vict. c. 89, § 69;
Western of Canada Oil Co. v. Walker,
 10 Ch. 628.

(*x*) *Accidental and Marine Ins.
 Co. v. Mercati*, 3 Eq. 200.

(*y*) *City of Moscow Gas Co. v.
 International Financial Society*, 7
 Ch. 225; *Pure Spirit Co. v. Fowler*,
 25 Q. B. D. 235; *Strong v. Carlyle
 Press* (No. 2), W. N. 1893, 51;
Washoe Mining Co v. Ferguson, 2
 Eq. 371.

order security to be given (a). And in the absence of any evidence to the contrary, the fact that the company is in liquidation affords a sufficient reason for ordering security (b). If the company alone appeals against a winding-up order, security for costs will usually be ordered (c). The amount and kind of security are in the discretion of the Court, and depend on the nature of the case (d).

An unlimited company, although it is insolvent and being wound up, cannot be ordered to give security for costs of an action (e).

In injunction actions the undertaking of a limited company alone to abide by such order as the Court may make as to damages is not usually sufficient (f).

If a company incorporated for a special purpose is exceeding its powers to the detriment of the public, an action by the Attorney-General will lie; as an illustration of this, reference may be made to *Attorney-General v. Great Northern Railway Company* (g), where a railway company was restrained from carrying on extensive dealings in coals. But an action will not lie by one of the public unless he proves special damage (h).

(a) *Southampton Steamboat Co. v. Rawlins*, 9 Jur. N. S. 887, and 2 N. R. 544, in which *Caillaud's, &c., Co. v. Caillaud*, 26 Beav. 427, *contra*, was not followed.

(b) *Northampton Coal, &c., Co. v. Midland Wagon Co.*, 7 Ch. D. 500; *Diamond Fuel Co.*, 13 Ch. D. 400; *Photographic Artists' Ass.*, 23 Ch. D. 370; *Pure Spirit Co.*, 25 Q. B. D. 235.

(c) *Photographic Artists, &c., Association*, 23 Ch. D. 370; *Diamond Fuel Co.*, 13 Ch. D. 400.

(d) R. S. C., Order lxv. rr. 6 and 7. As to the old practice, see *Imperial Bank of China v. Bank of Hindustan*, 1 Ch. 437, modifying *Australian Steam Ship Co.*, 4 K. & J. 407.

(e) *United Ports Co. v. Hill*, L. R. 5 Q. B. 395. This does not apply to appeals.

(f) *Anglo-Danubian Co. v. Roger-*

son, 3 N. R. 185, and 10 Jur. N. S. 87. As to the undertaking of counsel, see *East Molesey Local Board v. Lambeth Waterworks Co.* [1892], 3 Ch., pp. 299, 300.

(g) 1 Dr. & Sm. 154, and *Ware v. Regent's Canal Co.*, 3 De G. & J. 212. It may be inferred from the judgment in the latter case that a definite injury to the public need not be proved in order to support such an action. See, also, *Att.-Gen. v. Ely, Haddenham and Sutton Rail. Co.*, 4 Ch. 194; *Att.-Gen. v. Great Eastern Rail. Co.*, 11 Ch. D. 449, and 5 App. Ca. 473; *Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752; *Att.-Gen. v. North Metropolitan Tram. Co.* [1892], 3 Ch. 70. *Att.-Gen. v. London County Council* [1901], 1 Ch. 781.

(h) *London Association of Brokers v. London and India Docks Committee*

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Undertaking as
to damages.

Action by
Attorney-
General.

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Sect. 1.

Actions after
amalgamation.

Where companies are amalgamated by Act of Parliament, it is generally enacted that actions pending against either company may be continued against the amalgamated company, and in such cases it is only necessary to state the amalgamation on the proceedings (*i*).

At common law incorporated companies act in legal proceedings by their agents, appointed under seal (*k*).

Retainer under
seal when
presumed.

As between the parties to an action instituted by an incorporated company, a retainer under seal of the solicitor acting for it will, if necessary, be presumed (*l*); but in an action by that solicitor against the company for his costs, it is questionable whether a proper retainer under seal must not be proved (*m*), if such retainer is essential, which depends on the nature of the company (*n*).

The directors of a company have, it is conceived, power to institute and defend actions in the name of the company, and to do for it whatever may be necessary, having regard to the ordinary course of legal proceedings. It has been held that a bond given by an incorporated company as a security for costs in an action to which it is party, and in the ordinary course, is not *ultra vires* (*o*).

In a case where a company was restrained from infringing a patent the directors were ordered to pay the costs (*p*).

Officers, &c.,
may be inter-
rogated.

In an action by or against an incorporated company, any member or officer may, by leave, be examined on interrogatories (*q*).

[1892], 3 Ch. 242. See, too, *Johnston and Toronto, &c., Co. v. Consumers Gas Co. of Toronto* [1898], A. C. 447, and *Att.-Gen. v. London County Council* [1901], 1 Ch. 781.

(*i*) See Railways Clauses Act, 1863, 26 & 27 Vict. c. 92, § 43. But as to Industrial and Provident Societies, see 56 & 57 Vict. c. 39, §§ 53-57; and Benefit Building Societies, see 40 & 41 Vict. c. 63, § 5.

(*k*) See as to bankruptcy, 46 & 47 Vict. c. 52, § 148, and *G. I. Tomkins & Co.*, W. N. 1901, p. 11. As to registered companies, see 25 & 26 Vict. c. 89, § 64.

(*l*) *Thames Haven Dock Co. v.*

Hall, 5 Man. & Gr. 274.

(*m*) Compare *Arnold v. Mayor of Poole*, 4 Man. & Gr. 860, with *Haigh v. North Bierley Union*, E. B. & E. 873. See, too, *Ex parte Hanly*, 41 Ch. D. 215.

(*n*) *R. v. Cumberland*, 5 Ra. Ca. 332. See as to companies registered under the Act of 1862, § 37.

(*o*) *Young v. Brompton Waterw. Co.*, 1 Best & Sm. 675. See as to references to arbitration, *Faviell v. Eastern Counties Rail. Co.*, 2 Ex. 344.

(*p*) See *Betts v. De Vitre*, 5 N. R. 165, V.-C. Wood, and 3 Ch. 429 and 441.

(*q*) R. S. C., Order xxxi. rr. 1 and 5.

Primâ facie the secretary is the right person to answer the interrogatories (r), and if the person applying for leave to interrogate wishes to interrogate a member, the application should be served upon him (s). The court will not order the member selected by the applicant to answer, if the company object to him on reasonable grounds (t). The member or officer interrogated is only bound to answer as to his knowledge acquired in the course of his employment by the company, and as to the result of inquiries made by him of other officers and agents of the company with regard to their knowledge acquired in the same way; his answer is the answer of the company, and can be used against it (u); he need not be made a party to the action for purposes of discovery only (x).

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2. Companies empowered to sue and be sued by public officers.

Cost-book mining companies are empowered to sue for calls by their purser (y), but since the abolition of the Stannaries Court, and the transfer of its jurisdiction to the County Courts of Cornwall, the County Court Stannaries Jurisdiction Rules, 1897, apparently prevent actions in this form from being brought (z). Banking companies governed by the 7 Geo. 4, c. 46 (extended by 27 & 28 Vict. c. 32), and companies formed under the Letters Patent Act, 7 Wm. 4 & 1 Vict. c. 73 (a), are empowered by statute to sue and be sued in the name of an

Statutory enact-
ments enabling
companies to sue
and be sued.

(r) *Berkeley v. Standard Discount Co.*, 9 Ch. D. 643; 12 Ch. D. 295, and 13 Ch. D. 97; *Re Alexandra Palace Co.*, 16 Ch. D. 58; *Att.-Gen. v. North Metropolitan Tram. Co.* [1892], 3 Ch. 70, p. 74.

(s) *Chaddock v. British S. Africa Co.* [1896], 2 Q. B. 153.

(t) *Manchester Val de Travers, &c. Co. v. Slugg*, W. N. 1882, p. 127. See, too, *Republic of Costa Rica v. Erlanger*, 1 Ch. D. 171.

(u) *Welsbach Incandescent, &c., Co. v. New Sunlight, &c., Co.* [1900], 2 Ch. 1. The dicta of Cotton, L.J., to the contrary in *Southwark, &c., Water Co. v. Quick*, 3 Q. B. D. p. 321, cannot be relied upon.

(x) *Wilson v. Church*, 9 Ch. D. 552.

(y) See 32 & 33 Vict. c. 19, § 13; but this enactment only applies to actions for calls and to companies subject to the jurisdiction of the Stannary Courts. It does not extend to the presentation of a bankruptcy petition. *Ex parte Ashmead* [1893], 1 Q. B. 590.

(z) County Court (Stannaries Jurisdiction) Rules, 1897, r. 3, and Stannaries Court Abolition Act, 1896, 59 & 60 Vict. c. 45, and the Order of the Lord Chancellor thereunder, dated December 16, 1896. The Act and Order are printed in the Appendix.

(a) Industrial and Provident Societies were formerly empowered to sue and be sued by a public officer. *Burton v. Tannahill*, 5 E. &

Bk. II. Chap. 7. individual appointed to sue and be sued on their behalf; and
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— there is a large number of private Acts (b) enabling particular companies to sue and be sued in like manner. It is customary to designate such companies as *companies empowered to sue and be sued* (c), and amongst them will be found most existing unincorporated companies formed, for other than mining purposes, before the passing of the Joint Stock Companies Registration Act of 1844.

Who are represented by public officers.

A company which, without being incorporated, is empowered to sue and be sued by a public officer, is sufficiently represented by that officer in all actions between the company as a body on the one side, and a stranger on the other (d). But, as will be seen hereafter (e), a public officer does not represent one set of shareholders as against another set; for he is only the representative of the shareholders as a body.

Whether public officers must be sued.

It does not follow that, because a company is empowered by some private statute to sue and be sued by a public officer, therefore a creditor may not sue any one or more of the shareholders. Creditors are not deprived of their common law rights by an Act of Parliament which is consistent with their retention of those rights; and there are several instances of special statutes under which it has been held, that, although a creditor might sue the public officer, it was not incumbent on him to do so (f).

Powers of public officers.

Another observation to be made with respect to these private Acts, is that the public officers created by them have no powers except those expressly conferred upon them. Where, therefore, a company was empowered to sue and be sued in the name of its secretary, and to institute actions and suits in his name, it was

B. 797. By 39 & 40 Vict. c. 45, § 11, such societies were incorporated by being registered under that Act, and are now incorporated by being registered under 56 & 57 Vict. c. 39, § 21.

(b) There are also some colonial statutes to the same effect. The validity of one of them was unsuccessfully disputed in *Bank of Australasia v. Nias*, 16 Q. B. 717. See, too, *Bank of Australasia v. Harding*, 9 C. B. 661; and *Kelsall v. Marshall*, 1 C. B. N. S. 241.

(c) A good account of the progress of legislation relating to these companies will be found in *Van Sandau v. Moore*, 1 Russ. 441.

(d) See *Pendlebury v. Walker*, 4 Y. & C. Ex. 424; *Meux v. Maltby*, 2 Swanst. 277.

(e) See Bk. III. c. 9, § 1.

(f) *Blewitt v. Gordon*, 6 Jur. 825, per Coleridge, J.; S. C., 1 Dowl. N. S. 815; *Pentland v. Gibson*. 1 Alc. & Nap. 310; *Beech v. Eyre*, 5 Man. & Gr. 415.

held that he had no power to petition on behalf of the company for a commission of bankruptcy against one of its debtors (g). Bk. II. Chap. 7.
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Questions sometimes arise as to whether a public officer can sue or be sued in respect of a contract not expressly entered into with the company. These questions will all be found to turn on the language of the Act applicable to the company to which the questions relate; but speaking generally, it may be said that a public officer may sue or be sued upon contracts which are contracts of the company in point of substance, although not in point of form (h). On what contracts public officers may sue and be sued.

A promissory note payable to the order of a person who is in fact a trustee for a company empowered to sue by a public officer, ought, if unindorsed, to be sued upon by the payee and not by the public officer (i). Bills and notes.

A public officer may sue for a libel on the company represented by him (k). Libels.

By far the greater number of decisions to be met with in the books relating to public officers, have turned upon the Banking Act of 7 Geo. 4, and to these decisions, so far as they relate to actions between companies governed by the Act on the one hand, and strangers on the other, it is now proposed to direct the reader's attention. Public officers of banking companies.

The Banking Act of 7 Geo. 4, c. 46 (l), has been decided to require imperatively, that all actions by or against companies governed by it shall be brought by or against their public officers, and not otherwise (m). Decisions on 7 Geo. 4, c. 46. What is to be done if there is

(g) *Guthrie v. Fisk*, 3 B. & C. 178; and see *Ex parte Guthrie*, 1 Gl. & Jam. 245. Compare *Hope v. Meek*, 10 Ex. 829. As to pursers, *ante*, p. 379, note (y). Some of the older Acts only empower companies to sue by their public officers, and are altogether silent about their being sued. See the Act which was in question in *Meux v. Maltby*, 2 Swanst. 277. More modern Acts are much more comprehensive in their terms. See now Bankruptcy Rules 1886, r. 258, and *infra*, Bk. III. c. 8.

(h) *Soulby v. Smith*, 3 B. & Ad. 929; *Smith v. Goldsworthy*, 4 Q. B. 430; *Wills v. Sutherland*, 4 Ex. 211, and on appeal, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477. See, also, *Cobham v. Holcombe*, 8 C. B. N. S. 815.

(i) See *M'Dowell v. Doyle*, 7 Ir. Com. Law. Rep. 598. See as to bills payable to officers for the time being, 45 & 46 Vict. c. 61, § 7, cl. 2, *ante*, p. 278.

(k) *Williams v. Beaumont*, 10 Bing. 260.

(l) Amended by 1 & 2 Vict. c. 96, 3 & 4 Vict. c. 11, and 27 & 28 Vict. c. 32.

(m) *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milvain*, 5

Bk. II. Chap. 7. no public officer is not clear (*n*) ; perhaps now, in such a case, Sect. 1. a creditor could sue the company in its mercantile name ; or sue some of the members on behalf of the whole company (*o*).

The fact that the company has stopped payment does not prevent it from suing and being sued by its public officer (*p*) ; and if a banking company changes its name, the public officer of the new company represents the old company (*q*). Whatever number of public officers a company may have, one only should sue or be sued (*r*). The bankruptcy of a public officer does not prevent his being sued as such (*s*).

Effect of chang-
ing public
officer.

The change of a public officer *pendente lite* does not affect the action (*t*). If an action is brought by a public officer, and he dies or is removed, and no steps are taken by his successor to prosecute the action, it may, after the lapse of the usual time, be dismissed with costs for want of prosecution (*u*).

Action by a per-
son who assumes
to be a public
officer.

It is to be observed, that if a person who is not a public officer, sues as if he were, the company which he assumes to represent is not a party to the action, and consequently will not be affected by the judgment in it ; hence the fact, that the plaintiff is what he pretends to be, is material and traversible (*x*) ; and declarations and affidavits by public officers have been held bad for not stating with sufficient precision the character in which the plaintiff on the record

Ex. 61. Compare *Robertson v. Sheward*, 1 Man. & Gr. 511. See as to laying intent to defraud in indictments for forgery, *R. v. Carter*, 1 Car. & K. 741 ; *R. v. Beard*, 8 Car. & P. 143 ; *R. v. James*, 7 Car. & P. 553 ; and *R. v. Burgess*, ib. 490 ; and as to an affidavit to hold to bail, *Spencer v. Newton*, 6 A. & E. 630. The Industrial Provident Societies Act, 17 & 18 Vict. c. 25, was also imperative. *Burton v. Tannahill*, 5 E. & B. 797.

(*n*) See *Steward v. Greaves*, 10 M. & W. 711. An indictment will lie for stealing the property of the company although there is no public officer. *R. v. Pritchard*, 7 Jur. N. S. 557.

(*o*) See R. S. C., Order xvi. r. 9

and Order xlviii., and *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* [1901], A. C. 426.

(*p*) *Davidson v. Cooper*, 11 M. & W. 778 ; *Needham v. Law*, ib. 400.

(*q*) *Wilson v. Cruven*, 8 M. & W. 584.

(*r*) *Holmes v. Binney*, 4 Bing. N. C. 454.

(*s*) *Steward v. Dunn*, 11 M. & W. 63.

(*t*) See *Webb v. Taylor*, 8 Jur. 39 ; *Todd v. Wright*, 11 Jur. 471 ; *Barnewall v. Sutherland*, 9 C. B. 380 ; and *Paterson v. Ironside*, 14 Jur. 722, note.

(*u*) *Burmester v. Von Stentz*, 23 Beav. 32.

(*x*) See *Barnewall v. Sutherland*, 9 C. B. 380 ; *Steward v. Dunn*, 11 M. & W. 63.

was suing, and the existence of the company he assumed to represent (y). Bk. II. Chap. 7.
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Although, as has been seen, a public officer may sue on behalf of a company which has stopped payment, there can be no public officer under the 7 Geo. 4, c. 46, of a company which has not begun to carry on the business of bankers under that Act (z). Company must
have begun
business.

In an action against a public officer as a nominal defendant, he may deny that he fills the office he is assumed to fill (a). But this defence will be of no avail, if the only evidence to support it is that the company has ceased to carry on business (b). A plea of the bankruptcy of a person sued as a public officer will not be allowed to stand, if the plaintiff will give an undertaking not to issue execution against the person or property of the defendant himself (c). Plea that person
sued is not a
public officer.

Under the 7 Geo. 4, c. 46, public officers are appointed by their respective companies; and returns are required to be made to the Stamp Office, in the form given in the schedule to the Act, stating the names and places of abode of the persons so appointed (d). The most formal evidence of the appointment of a particular individual to be a public officer of a company, is the return made by the company to the Stamp Office in pursuance of the statute. But it has been frequently decided that the appointment may be proved otherwise than by such returns, *e.g.*, by parol testimony, and that an informality in a return is of no importance, if satisfactory evidence *aliunde* of the alleged appointment is forthcoming (e). Appointment of
public officers
under 7 Geo. 4,
c. 46.

(y) See *Esdaile v. Maclean*, 15 M. & W. 277; *McIntyre v. Miller*, 13 ib. 725; *Fletcher v. Crosbie*, 9 ib. 252; *Christie v. Peart*, 7 ib. 491; *Spiller v. Johnson*, 6 ib. 570; *Davidson v. Bower*, 4 Man. & Gr. 626. See as to affidavits, *Ex parte Tor-kington*, 9 Ch. 298; *Ex parte Lowenthal*, ib. 324. Compare *Robinson v. Sheward*, 1 Man. & Gr. 511, where the character in which the plaintiff was suing did not appear on the record, and was not in issue.

(z) *Roe v. Fuller*, 7 Ex. 220; *Steward v. Dunn*, 11 M. & W. 63;

Fletcher v. Crosbie, 9 M. & W. 252; and compare *Davidson v. Bower*, 4 Man. & Gr. 626.

(a) Qu. whether the denial must not be supported by affidavit, *Wood v. Marston*, 7 Dowl. 865.

(b) See *Needham v. Law*, 11 M. & W. 400; *Davidson v. Cooper*, ib. 778.

(c) *Steward v. Dunn*, 11 M. & W. 63; *Wood v. Marston*, 7 Dowl. 865.

(d) 7 Geo. 4, c. 46, § 4.

(e) *Edwards v. Buchanan*, 3 B. & Ad. 788; *R. v. Carter*, 1 Car. & K. 741; *R. v. Beard*, 8 C. & P. 143; *R. v. James*, 7 C. & P. 553.

Bk. II. Chap. 7.
Sect. 1.

Interrogating
public officer.

Public officers
of companies
governed by
7 Wm. 4 &
1 Vict. c. 73.

It has been decided that if a public officer brings an action, he may be interrogated by the defendant (*f*).

The law relating to public officers of companies formed under the Letters Patent Act, 7 Wm. 4 & 1 Vict. c. 73, will be found in §§ 3, 13, 22, 23, 24 and 25 of that Act. There have been no decisions upon it bearing upon the present subject, but it seems clear that a company governed by it must sue and be sued by its public officer, if there is one; but if there is not, then any member of the company may be sued.

3. Other unincorporated companies.

Difficulty of
suing before the
Judicature Acts.

Unincorporated companies not empowered by statute to sue and be sued by a public officer, must sue and be sued like ordinary partnerships (*h*). This observation applies to unincorporated cost-book companies (*i*). Consequently, before the passing of the Judicature Acts, it was extremely difficult for unincorporated and unprivileged companies to sue at law at all, and various unsuccessful attempts were made to avoid the necessity of joining all the proper persons as co-plaintiffs (*k*).

(*f*) *M'Kenna v. Rolt*, 3 Jur. N. S. 714, Ex.

(*h*) As to which, see Partn. book ii., c. 3, pp. 272 *et seq.*, and R. S. C., Order xlviii.

(*i*) As to the power of such companies to sue for calls by their purser, see *ante*, p. 379. There is no statutory enactment enabling them to sue and be sued generally by that officer. See, too, County Court (Stannaries Jurisdiction) Rules, 1897, rr. 8, 9, and 24, and County Court Rules, Order III., rr. 13a, 14a.

(*k*) See as to all such attempts, *Radenhurst v. Bates*, 3 Bing. 470; and as to agreements to enable actions to be brought by the chairman for the time being of the direc-

tors of a company, *Hall v. Bainbridge*, 1 Man. & Gr. 42; by the directors for the time being of a company, *Phelps v. Lyle*, 10 A. & E. 113; *Woolmer v. Toby*, 4 Ra. Ca. 713; by the purser for the time being of a cost-book company, *Hybart v. Parker*, 4 C. B. N. S. 209; by the managers of a mutual marine insurance society, *Gray v. Pearson*, L. R. 5 C. P. 568; *Corner v. Maxwell-Irwin*, Ir. R. 10 C. L. 354. On the other hand a contract made with an agent of a company might be sued on by the agent, unless the contract was on the face of it made with the company through its agent. See *Clay v. Southern*, 7 Ex. 717, and so it may now.

But even as the law stood before those Acts, there was no great difficulty in the way of a creditor who sought to obtain payment of a debt owing by the company. For although if he did not sue all the shareholders who in strictness ought to have been sued, he might have been met by a plea in abatement, yet inasmuch as such a plea was of no avail unless it disclosed the names of *all* the persons who ought to have been made defendants, and unless it was verified by affidavit, and unless it was strictly proved if issue was taken upon it, it was practically impossible for a member of a large company seriously to obstruct or embarrass a creditor by having recourse to a plea in abatement, founded on the non-joinder of the other shareholders (l).

Bk. II. Chap. 7.
Sect. 1.

The alterations made in the law respecting parties to actions by the Judicature Acts and rules, have, however, removed the difficulty in the way of unincorporated companies suing, for an action may now be maintained by or against some of the shareholders on behalf of themselves and others having a common interest in the action (m); or, where the company is carrying on business within the jurisdiction of the High Court, an action may be brought in the name of the company (n).

Alterations made
by the Judica-
ture Acts.

Actions by or against some shareholders on behalf of themselves and others will have to be adverted to hereafter when treating of actions between companies and their members; but it may be observed here that even before the Judicature Acts, suits in equity by some persons on behalf of themselves and others having a common interest, were frequently instituted to enforce equitable rights, *e.g.*, to enforce the rights of the mortgagees of a company's undertaking (o); to rescind a

Actions by some
on behalf of
themselves and
others.

(l) *Crellin v. Calvert*, and *Crellin v. Brook*, 14 M. & W. 11, may be referred to as illustrating the above observation.

(m) R. S. C. Order xvi. r. 9.

(n) Order xlviiiA. See Partn. Bk. II., c. 3, § 1, pp. 272 *et seq.* The rules apply to foreign unincorporated companies if they carry on business within the jurisdiction.

See, in addition to cases there cited, *Worcester, &c., Banking Co. v. Firbank, Pauling & Co.* [1894], 1 Q. B. 784. As to such actions in the county courts, see County Court Rules, Order iii. rr. 13A *et seq.*

(o) *Tripp v. Chard Rail. Co.*, 11 Ha. 241. See as to debenture holders' actions, *ante*, pp. 334 *et seq.*

Bk. II. Chap. 7. contract for fraud (p); to enforce specific performance of an agreement (q); to obtain an account (r), or an injunction (s).
Sect. 1.

Some on behalf
when firm is
sued.

So a suit against some of the members of a numerous partnership or unincorporated company, might be maintained to enforce an equitable right if it was a right against the whole body, and one which all the members thereof had a common interest in opposing (t). But suits in this form could not be maintained to enforce purely legal rights, on the ground that it was inconvenient to sue at law (u).

Now actions in this form are maintainable in all the divisions of the High Court (x). Such actions, however, are occasionally attended with inconvenience, for although judgment may be obtained, it may be found practically useless.

Meux v. Maltby. The case of *Meux v. Maltby* (y) illustrates this. A suit was there instituted against the treasurer and the directors of a company, to obtain the benefit of an agreement made with the plaintiff by the former owner of property which had become vested in the company. The agreement was an agreement for a lease, and the Court made a decree in the plaintiff's favour, but found itself unable to decree the execution of any lease to him. The defendants had no power to convey the legal estate in the land, and all the Court could do was to declare the plaintiff entitled to a lease, and to restrain the officer from bringing any action to disturb the plaintiff's possession.

(p) *Small v. Attwood, Younge*, 457 *et seq.*; *Fenn v. Craig*, 3 Y. & C. Ex. 213.

(q) *Clay v. Rufford*, 8 Ha. 281; and see *Douglas v. Horsfall*, 2 Sim. & Stu. 184.

(r) *Gordon v. Pym*, 3 Ha. 223.

(s) *Lund v. Blanshard*, 4 ib. 290.

(t) See *Pare v. Clegg*, 29 Beav. 589, where a suit was instituted by the creditor of a benefit society against its trustees, and one of each class of its members. See, also, *Adair v. The New River Co.*, 11 Ves. 429; *Meux v. Maltby*, 2 Swanst. 277; *Fenn v. Craig*, 3 Y. & C. Ex. 216; *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101, and 1 Bro. P. C.

396; *The City of London v. Richmond*, 2 Vern. 421.

(u) *Allison v. Herring*, 9 Sim. 583.

(x) See generally as to these actions, *Bedford (Duke of) v. Ellis* [1901], A. C. 1, and *Taff Vale Rail. Co. v. Amalgamated Society of Rail. Serrants* [1901], A. C. 426, reversing [1901] 1 K. B. 170.

(y) 2 Swanst. 277. See, too, *Lund v. Blanshard*, 4 Ha. 290, where an injunction restraining a defendant from suing the plaintiffs, was held not to preclude the defendant from suing other persons on behalf of whom the plaintiffs filed their bill.

SECTION II.—OF SET-OFF BY AND AGAINST COMPANIES.

Bk. II. Chap. 7.
Sect. 2.

In actions between companies on the one hand and non-members on the other, there is little to be said upon the subject of set-off, except that the ordinary rules are applicable; the most important rule being that joint debts cannot be set off against separate debts (z), and that the debts of a body corporate cannot be set off against the separate debts of its members. Unliquidated damages may be set off in an action by the company although it is being wound up (a).

It is only when a company sues or is sued by one of its own members, or by some person claiming under him, or when one member of a company, having obtained judgment against it, seeks to enforce such judgment against a co-member, or when a company is being wound up, that questions of set-off present peculiar difficulties. These are matters, however, which will be more conveniently discussed hereafter, and the only observation which requires to be made here is, that in actions between a company on the one hand and one of its own members on the other, the member is so far treated as a stranger to the company, that cross debts existing between him and the company may be set off against each other (b), but that cross demands between himself and other members individually cannot be gone into. As regards incorporated companies, this follows from the circumstance that they are distinct from the members composing them; and as regards unincorporated companies, it follows from the doctrine that a debt due from or to several persons jointly, cannot be set off against a debt due to or from some or one of them only.

Set-off where a
company sues a
member.

Moreover, if a member of an unincorporated joint-stock company is a creditor of the company, and is in a position to sue the other members or any of them, it is no defence that if the company were wound up, and its accounts taken, the plaintiff would be found indebted to the company as a shareholder thereof. In such a case as that now supposed, the

Set-off where
one member sues
another for a
debt owing by
the company.

(z) Partn. Bk. II., c. 3, § 2, *reign Life Ass. Co. v. Dodd* [1892], 2 Q. B. 573.

(a) *Mersey Steel and Iron Co. v. Naylor & Co.*, 9 Q. B. D. 648, and 9 App. Ca. 434. See, also, *Sove-*

(b) *Garnet Mining Co. v. Sutton*, 3 B. & Sm. 321.

Bk. II. Chap. 7. plaintiff sues as a non-member; and if his demand is one
 Sect. 2. — capable of being enforced, he will not be prevented from enforcing it, simply because in his character of member, he is indebted to his co-shareholders. This is well illustrated by a case before Lord Cottenham, which may be conveniently noticed here, although it will have to be referred to again in connection with another subject. In the case in question,

Rheam v. Smith. *Rheam v. Smith* (c), the plaintiff and one of the defendants were members of an unincorporated joint-stock company; the defendants were the bankers of the company, and had sued the plaintiff for a debt due by the company to the defendants as bankers. The plaintiff thereupon filed a bill against the bankers and the company, upon the ground that he ought not, as between himself and the bankers (one of whom was a shareholder), to pay more than what, on taking the accounts of the company, would be found to be due from the plaintiff in respect of the debt in question. The bill accordingly prayed that the accounts of the company might be taken, and its affairs wound up, and that provision might be made for due payment of the debts of the company, and that in the meantime the action, and all proceedings therein, might be stayed. A demurrer to the bill was overruled by the Vice-Chancellor, who, it is said, treated the case as one in which a partnership of A. and B. was suing a partnership of A., C., and D., in which case it would be contrary to equity to allow the debt to be recovered without first ascertaining for what proportion of it A. was himself liable (d). But on appeal to the Lord Chancellor, the decision below was reversed, and the demurrer was allowed: the Lord Chancellor observing,—

“It really seems to me that, if the principle upon which this demurrer is said to have been overruled by the Vice-Chancellor were admitted, it might lead to the most frightful consequences; for it comes to this, that if a railway company, or any company carrying on great works, and who may have become indebted to some contractor in half-a-million of money for work done, upon that contractor applying for payment of his debt, can find out that he, or any one connected with him in business, holds a single

(c) 2 Ph. 726.

(d) The fact that such an action could not be maintained at law, is not noticed in the report. But it is

clear that although one partner might under certain circumstances sue another at law, A. and B. could not possibly have sued A. and C.

share in the company, they may say, No, we cannot pay our debt: you must first break up the company, and ascertain whether its assets are sufficient for payment of its debts, for if not, you or the persons connected with you will be liable to contribute to the very sum which you seek to recover. It is impossible to stop short of that if the principle be once admitted. After some difficulty a rule has been established at law, enabling creditors of these great companies to enforce their claims against individual shareholders, leaving them, of course, to their right to contribution against their copartners. The rule, no doubt, leads sometimes to hardship upon the party sued, but the balance of convenience is in its favour, and for that reason it has been adopted: because it would be a still greater hardship upon parties dealing with such companies, if the enforcement of their claims were to be embarrassed by the necessity of treating all the members of the company as jointly responsible. This suit, however, is an attempt to induce a court of equity to interfere with that rule, for the plaintiff, by his bill, asserts in effect nothing short of this proposition:—If I can find out that you, who are suing me at law, have a single share in the company against whom the claim is made, then there is an end to your legal right; equity will interfere, and though your money may have contributed to the establishment of the company, you shall not be permitted to recover a single farthing against any member of the company until the concern is altogether wound up.”

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Sect. 2.

Rheam v. Smith.

It must not, however, be inferred from this case, that if a member of a company has a demand against it, and seeks to enforce that demand against some member of it, he may not be met by some defence based on the rights of the members *inter se*. This subject will be examined in the third book, when the rights of members *inter se* are discussed (e).

The general rule that an assignee of a debt is in no better position than his assignor, is undoubted; and, as a general rule, where a debt due from a company is assigned, the assignment cannot defeat the right of the company to set off against the assignee, what may be due from the assignor to the company before the company has notice of the assignment, and when payment by the company is demanded (f); nor defeat the company's right to set off what may become due after such

Set-off against
holders of
securities.

(e) See *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(f) *Ashworth's case*, 10 W. R. 771, V.-C. W.; and see *Athenæum Life Assurance Society v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. See, also, *Christie v. Tuunton, Del-*

murd, & Co. [1893], 2 Ch. 175; *Watkins v. Clark*, 12 C. B. N. S. 277; *Watson v. Mid Wales Rail. Co.*, L. R. 2 C. P. 593. The notice must be clear and distinct. *Lloyd v. Banks*, 3 Ch. 488, p. 490; *Bence v. Shearman* [1898], 2 Ch., p. 587.

Bk. II. Chap. 7. notice under the same contract as created the debt assigned (g).
Sect. 3.

At the same time, it is possible for a company to deprive itself of this right of set-off; and if, being indebted, it gives to its creditor a document which shows that the debt is to be paid without reference to the state of other accounts which may exist between him and the company, the company cannot, when sued for such debt, set off demands which it may have against him for other matters. The decisions on this subject have been already alluded to (h), and will be more conveniently discussed hereafter when treating of the proof of debts in winding-up proceedings (i).

If the company gives to its creditor a promissory note or other negotiable instrument for its debt, the company may disregard any assignment of the debt, and pay the holder of the note or negotiable instrument, even though he be the creditor who has assigned the debt (k).

SECTION III.—EXECUTION AGAINST COMPANIES AND SHAREHOLDERS ON JUDGMENTS AGAINST THEIR COMPANIES.

Judgments
against com-
panies.

By the common law, a judgment against an incorporated company can only be executed against the property of the company; and a judgment against an individual cannot by common law be executed against any person or property, except the person or property of the individual named in the judgment. In order, however, to give creditors a more extensive remedy than they would have at common law upon a judgment obtained against companies, either in their corporate names or in the names of their public officers, the Legislature has rendered such judgments enforceable against

(g) See, as to this, *Government of Newfoundland v. Newfoundland Rail. Co.*, 13 App. Ca. 199, and *Salton v. New Beeston Cycle Co.* [1899], 1 Ch. 775, where a sum due on a director's qualification shares was set off against a claim for his fees made by an assignee of them.

(h) See *ante*, pp. 301, 302, and as

to the effect of a floating charge on a right of set-off, *ante*, p. 321.

(i) See *infra*, Bk. IV. c. 1, § 12; and *Aslatt v. Farquharson*, 10 W. R. 458.

(k) *Bence v. Shearman* [1898], 2 Ch. 582. See, too, *Ex parte Richdale*, 19 Ch. D. 416.

the individual members of the companies. For this purpose three schemes have been had recourse to. Bk. II. Chap. 7
Sect. 3.

The first in point of time was applicable to companies empowered to sue and be sued, and was as follows:—A creditor having obtained judgment against the public officer, was allowed to proceed upon that judgment by *scire facias* against any of the shareholders in the company at the time the judgment was obtained; and, if necessary, also against such of the late shareholders as were members of the company when the debt was contracted. Modes of executing such judgments against the members.
First mode.

The next device was a mere modification of the last, and consisted in the application of it to judgments against companies by their corporate names, which judgments were made enforceable against shareholders and former shareholders in substantially the same manner as that above explained: a qualification, however, was added to the effect that recourse should not be had against individual shareholders until efforts had been made in vain to obtain payment from the company, and as to some companies, that recourse should not be had against any shareholder except to the extent of his shares. Second mode.

The third and last device was altogether different, and was the result of the course adopted by creditors, who, when they could not obtain satisfaction from companies, singled out some unfortunate shareholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree cruel; and Parliament was induced, when legislating on joint-stock companies, in 1856, to leave out all those clauses, found in the preceding Acts, enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. The same view prevailed when the Acts relating to joint-stock companies were remodelled in 1862. Consequently, a creditor of a company registered under the Companies Act, 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company. Third mode.

Bk. II. Chap. 7. Sect. 3. — Such is a general outline of the manner in which a creditor of a company has been enabled to obtain satisfaction of a judgment recovered against it. To fill up this outline so far as is possible, without alluding to repealed statutes and to the winding up of companies, is the object of the remainder of the present section.

1. Execution against the company.

Execution
against cor-
poration.

A judgment against a corporation is executed against the corporate property in the same way as a judgment against an individual is executed against his property; and a judgment against a public officer may, it is conceived, be executed against him and his property as if he were an ordinary individual, where the right of the judgment creditor is not in this respect modified by statute (*l*).

Fraudulent
dispositions
of company's
property.

What is property of a company must be determined by ordinary principles of the law of property (*m*). It must be borne in mind that unsecured creditors of companies, whether limited or unlimited, have no lien on their assets (*n*); and cannot prevent a sale or other disposition thereof (*o*); and it is clearly competent for all companies to divide profits amongst their shareholders, and to that extent to convert what was property of the company into the separate estates of the members. But any division of the property of a company amongst its members which is not warranted by the constitution of the company can be impeached by the company itself (*p*); and any division of the assets of a company which would not leave enough to pay the creditors of the company, would *primâ facie* be a fraud upon them; and even if not a fraud upon them would probably be *ultra vires* (*q*).

(*l*) See *Harrison v. Timmins*, 4 M. & W. 510; *Wormwell v. Hailstone*, 6 Bing. 668, where the nominal defendant was held not liable to execution; and *Corpe v. Glyn*, 3 B. & Ad. 801, where he was held not liable to an attachment. See *infra*, as to particular companies.

(*m*) As to the priority of debenture holders over execution creditors see *ante*, p. 324.

(*n*) But see, as to cost-book companies, 32 & 33 Vict. c. 19, §§ 24 and 36, and 50 & 51 Vict. c. 43, § 4. giving miners a lien for their wages.

(*o*) *Mills v. Northern Rail. of Buenos Ayres Co.*, 5 Ch. 621.

(*p*) See *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

(*q*) See, as to this, *Stringer's case*, 4 Ch. 475; *Cardiff Coal Co. v. Norton*, 2 Eq. 558, affirmed by Lord Chelms-

The rolling stock and plant of railway companies (*r*) are, in most cases (*i.e.*, where the judgment on which execution issues is recovered in an action on a contract entered into after the 20th August, 1867, or in an action not on a contract commenced after that date), protected from seizure by statute (*s*); but a judgment creditor of such a company can obtain a receiver, and, if necessary, a manager of the undertaking of the company (*t*), and can issue execution against its unprotected property, and obtain a sale of its surplus lands (*u*). The moneys received by the receiver or manager are to be applied and distributed, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, under the direction of the Court in payment of the debts of the company and otherwise, according to the rights and priorities of the persons interested therein (*x*).

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Sect. 3.
Protected
property.

A corporation cannot be attached for contempt or for disobedience to an order made upon it (*y*). But if an order is made upon a corporation, and its directors or officers set the order at defiance, an attachment against them personally will,

Attachments.

ford, 2 Ch. 405. The decision in this case was probably right under the peculiar circumstances affecting the real plaintiff, but some of the principles laid down in the case deserve serious reconsideration.

(*r*) The term includes railway and dock companies. See *East and West India Docks Co.*, 38 Ch. D. 576; *Gt. North. Rail. Co. v. Tuhourdin*, 13 Q. B. D. 320. Compare *Exmouth Docks Co.*, 17 Eq. 181. Tramway companies are not railway companies. *Borough of Portsmouth, &c., Tram. Co.* [1892], 2 Ch. 362; *Brentford, &c., Tram. Co.*, 26 Ch. D. 527.

(*s*) 30 & 31 Vict. c. 127, § 4, made perpetual by 38 & 39 Vict. c. 31. An action to recover payments provided for by a special Act is an action "not on a contract." *Manchester and Milford Rail. Co.* [1897], 1 Ch. 276.

(*t*) *Manchester and Milford Rail.*

Co., 14 Ch. D. 645; *Southern Rail. Co.*, 5 L. R. Ir. 165. The line must have been begun, see *Birmingham and Lichfield Rail. Co.*, 18 Ch. D. 155, but *qu.* if it need be open for traffic before a receiver can be appointed. *Knott End Railway Act*, 1898 [1901], 2 Ch. 8. Only one receiver will be appointed, *Mersey Rail. Co.*, 37 Ch. D. 610, which see as to priorities.

(*u*) *Hull, Barnsley, &c., Rail. Co.*, 40 Ch. D. 119. See as to debenture holders, *ante*, pp. 344-346.

(*x*) As to what are working expenses and proper outgoings see *Wrexham, Mold, &c., Rail. Co.* [1900], 2 Ch. 436, and [1900], 1 Ch. 261; *Eastern and Midlands Rail. Co.*, 45 Ch. D. 367; *Navan and Kingscourt Rail. Co.*, 17 L. R. Ir. 398.

(*y*) *Muckenzie v. Sligo and Shannon Rail. Co.*, 9 C. B. 250, a case of an award.

Bk. II. Chap. 7. if necessary, be granted (z). By the Rules of the Supreme Court, 1883, Order xlii. r. 81, it is provided that:—

Executions
against com-
panies.
Attachments.

“Any judgment or order against a corporation wilfully disobeyed, may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by an attachment against the directors or other officers thereof, or by writ of sequestration against their property” (a).

The officer whom it is sought to attach must be personally served with the judgment or order (b).

Under Acts
rendering the
company's funds
alone liable.

Acts of Parliament are sometimes met with which empower a company to sue and be sued by a public officer, but which, instead of giving any remedy against him or the other shareholders individually, render the funds of the company alone liable to its creditors. In such a case no execution against the public officer of the company, or against any of its shareholders, can be issued (c); but an action against the public officer will nevertheless lie, even although there may be no funds, and the plaintiff may consequently have no means of enforcing his judgment after he has obtained it (d). If there are funds they can be got at; but before the Judicature Act it was said that the only mode in which a creditor could get at them was by *mandamus*, or by a bill in equity (e).

Mandamus in
such cases.

Even before the Common Law Procedure Act of 1854, the 68th section of which considerably extended the power of courts of law to grant a *mandamus* (f), it had been held that a creditor of a company, who by virtue of its Act of Parliament had no remedy against its shareholders, but only against the

(z) *Lacharme v. Quartz Rock Mining Co.*, 1 H. & C. 134, and see *Salman v. Hamburg Co.*, 1 Ch. Ca. 204.

(a) This rule takes the place of § 33 of the C. L. P. Act, 1860 (23 & 24 Vict. c. 126), which was repealed by 46 & 47 Vict. c. 49.

(b) *McKeown v. Joint Stock Institute* [1899], 1 Ch. 671.

(c) See *Harrison v. Timmins*, 4 M. & W. 510; *Wormwell v. Hailstone*, 6 Bing. 668; *Corpe v. Glyn*, 3 B. & Ad. 801.

(d) See *Kendall v. King*, 17 C. B.

483. Absence of funds is no defence to an action against a corporation. See *ante*, p. 356.

(e) See the cases in the last two notes. Actions have been brought in such cases, as in *Canev. Chapman*, 5 A. & E. 647; but see *Addison v. The Mayor of Preston*, 12 C. B. 108.

(f) See *Norris v. The Irish Land Co.*, 8 E. & B. 512, correcting *Benson v. Paull*, 6 E. & B. 273. The section was repealed by 46 & 47 Vict. c. 49. The Supreme Court Rules of 1883, Order liii. rr. 1 to 4, have taken its place.

funds of the company, was entitled to a *mandamus* to its treasurer and directors, after establishing his debt in an action (g). If there are no funds, and the company is not under an obligation to provide any, no *mandamus* can be granted (h); but if the company is under an obligation to provide funds, and it will take no measures to raise them, it seems that a *mandamus* will go (i). It has, however, been held that a writ of *mandamus* will not be granted if the only reason why payment cannot be obtained by execution in the ordinary way, is, that there is nothing to seize (k).

The effect of winding up a company upon executions against it will be examined hereinafter in the Fourth Book.

2. *Proceedings against shareholders upon a judgment obtained against the company or its public officer, generally.*

If a company is incorporated, or if it must be sued by a public officer, a creditor cannot proceed by action against a shareholder; but must obtain judgment against the company and then proceed upon that judgment (l).

Shareholder can only be proceeded against after judgment against the company.

By the common law, a judgment against A. cannot be executed against B. without a *scire facias*, which though a judicial writ, is in the nature of an action, and may be pleaded to accordingly. So, before a judgment in the Chancery Division against a public officer can be enforced against individual shareholders, an order against them personally must be obtained (m). The object of the *sci. fa.* was technically to make the execution conformable to the judgment; but substantially its object was to give the person against whom the judgment was sought to be enforced an opportunity of defending himself; for, *ex hypothesi*, he had not had that opportunity before (n).

Sci. fa. against shareholders.

Judgment in the Chancery Division.

(g) See *Corpe v. Glyn*, 3 B. & Ad. 801; *R. v. St. Katherine Dock Co.*, 4 ib. 360.

(h) *R. v. The Victoria Park Co.*, 1 Q. B. 288.

(i) *Ib.*; and see R. S. C. Order liii. r. 1.

(k) See *R. v. The Victoria Park*

Co., 1 Q. B. 288.

(l) *Fell v. Burchett*, 7 E. & B. 537; and see as to public officers, *ante*, pp. 379 *et seq.*

(m) *Vigers v. Pike*, 8 Cl. & Fin. 652; *Healey v. Chichester and Midhurst Rail. Co.*, 9 Eq. 148.

(n) See, generally, as to *sci. fa.*

Bk. II. Chap. 7. Proceedings by *sci. fa.* have not been abolished; but a much simpler mode of proceeding has been introduced by the Rules of the Supreme Court, 1883, Order xlii. r. 23, which provides that—

Sect. 3.
(Order xlii.
r. 23.

“Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly, and such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just” (o).

This improvement in procedure renders it unnecessary to refer at length to the old rules of practice relating to *sci. fa.*; but as they may be still useful in some cases, a short account of them is given in a note at the end of the present chapter.

Registry of judgments against companies.

A judgment or writ of execution against a company or its public officer may be registered like any other judgment or writ of execution; and in those cases in which a judgment is equivalent to a judgment against all the members of the company individually, and is enforceable against them, it has been supposed to affect them as if it had been in form a judgment against them individually and registered accordingly (p). But as a judgment against a company or its public officer could not be executed against an individual shareholder of the company without a *sci. fa.*, it could not be reasonable to make that judgment a charge on his property before execution against him could lawfully be sued out (q). A judgment registered

Com. Dig. Pleader, 3 L.; Bac. Ab. *Sci. fa.*, and the note to *Underhill v. Devereux*, 2 Wms. Saund. 71.

(o) There is a similar rule in the County Court Rules, see Order xxv. r. 9. Under the old law see *Taylor v. The Crowland Gas Co.*, 11 Ex. 1.

(p) See *Ex parte Ness*, 5 C. B. 155.

(q) See *Harris v. The Royal British Bank*, 2 H. & N. 535. It has been held in Ireland that a judgment obtained against a company ought not to be registered against a former shareholder. See *Hone v. O'Flaherty*, 9 Ir. Ch. 119, where relief against such registration was given. See, also, *Ex parte Thornton*, 2 Ch. 171, as to register-

against a company governed by the Act of 1862 obviously does not affect the property of its members. Bk. II. Chap. 7.
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In order to enable a creditor who has obtained judgment against a company to discover the persons against whom such judgment may be executed, provision has been made by the various statutes relating to companies compelling them to make periodical returns, or to keep registers, of the names and residences of their shareholders, and directing such returns or registers to be open for inspection (r). Discovery of
shareholders.

A creditor who has obtained judgment against a company, and is in a position lawfully to execute such judgment against the individual members of that company, cannot be restrained from proceeding to execute it against any member or members he may choose to select, provided he acts *bonâ fide* for the purpose of obtaining payment of what is due to him (s). But, as will be seen hereafter, neither a judgment creditor, nor a purchaser from him, will be allowed to use the judgment for the dishonest purpose of aiding some members of the company against the others (t). Right of creditor
to proceed against
individual share-
holders.

Upon a proceeding against a shareholder to enforce a judgment already obtained against a company or public officer, the shareholder is bound by the judgment, and cannot impeach it, except on the ground that the judgment itself was obtained by fraud (u). A judgment obtained by default is, in the

ing winding-up orders. See now 51 & 52 Vict. c. 51.

(r) See 7 Geo. 4, c. 46, §§ 4 *et seq.*; 7 Wm. 4 & 1 Vict. c. 73, §§ 6 *et seq.*; 8 & 9 Vict. c. 16, §§ 9, 10, 36; and as to the mode of obtaining inspection, see *Meador v. I. of Wight Ferry Co.*, 9 W. R. 750, Ex., where a *mandamus* was held not necessary. *R. v. The Derbyshire Rail. Co.*, 3 E. & B. 784, where a *mandamus* was obtained. As to examining the directors, see *Dickson v. Neath and Brecon Rail. Co.*, L. R. 4 Ex. 87. See, also, R. S. C. Order xlii. rr. 32 *et seq.*, as to discovery in aid of execution.

(s) See *Morisse v. The Royal*

British Bank, 1 C. B. N. S. 67; *Green v. Nixon*, 23 Beav. 530. See, also, *Hardinge v. Webster*, 1 Dr. & Sm. 101, where it was held that a member of a company who had obtained judgment against it could not be restrained from enforcing that judgment against another member of the same company. The company was governed by 7 & 8 Vict. c. 110, and had become amalgamated with another company in which the defendant was a shareholder, but the plaintiff was not.

(t) See *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(u) See *Peddell v. Gwyn*, 1 H. & N. 590; *Bradley v. Eyre*, 11 M. &

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Exception in
cases of fraud on
the part of the
creditor.

absence of fraud, as conclusive against the shareholders as any other judgment (x).

A judgment obtained by fraud and collusion is however always impeachable by innocent parties affected by it; and however high the tribunal in which the judgment has been pronounced may be, its invalidity on the ground of fraud may be examined by any inferior court which may happen to be called upon to give effect to it (y). If, therefore, a shareholder is proceeded against upon a judgment obtained by fraud on the part of the creditor, the judgment may be impeached; and it seems that the shareholder may at his option either apply to the Court in which the judgment was obtained to have it set aside, or rely on the fraud as a defence to a *sci. fa.*, or to an application for leave to issue execution as the case may be (z).

It is apprehended that the same principles would apply in the case of a judgment obtained by consent on a contract which was *ultra vires* the company, if the question of *ultra vires* was not raised in the pleadings or in the course of the proceedings (a).

Fraud by com-
pany on share-
holder does not
protect him from
sci. fa.

It is to be observed that the fraud above referred to as affording a defence to the *sci. fa.*, is fraud on the part of the judgment creditor in obtaining the judgment. Fraud on a shareholder by the directors of the company, and to which fraud the creditor is not privy, affords no defence to proceedings by him against the shareholder. This was decided in several cases arising out of the failure of the Royal British

W. 432; *Fowler v. Rickerby*, 2 Man. & Gr. 760.

(x) *Green v. Nixon*, 23 Beav. 530. See, also, *Ex parte Chorley*, 11 Eq. 157.

(y) See *Shedden v. Patrick*, 1 McQu. 535; *The Duchess of Kingston's case*, in 2 Sm. L. C., and the admirable dissertation upon it there.

(z) See *Dodgson v. Scott*, 2 Ex. 457; *Edwards v. The Kilkenny Co.*, 2 C. B. N. S. 397; *Philipson v. Egremont*, 6 Q. B. 587; *Bosanquet v. Graham*, 6 Q. B. 601, note; *Green*

v. Nixon, 23 Beav. 530. The first two of these cases, and *Harvey v. Scott*, 11 Q. B. 92, show that it is not proper to raise the question of fraud upon a motion for leave to issue a *sci. fa.*

(a) *Great North Western, &c., Rail. Co. v. Charlebois* [1899], A. C. 114. In such cases the judgment has no greater validity than the contract on which it was founded. Compare *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547, noticed *ante*, p. 202.

Bank, and is a necessary consequence of the principles of the law of partnership (b). Bk. II. Chap. 7.
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A shareholder in a company cannot escape from the liability to its creditors which is imposed upon him as a shareholder, except by virtue of some act of theirs; and nothing short of fraud on their part, or of some contract or conduct of theirs precluding them from treating him as their debtor, will afford him a defence as against them so long as their demand exists as between them and the company, unless perhaps such demand is based on a consent judgment which is in substance *ultra vires* the company (c). This is well illustrated by *Bill v. Richards* (d), where a shareholder in a railway company pleaded to a *sci. fa.* issued against him by a creditor who had obtained judgment against the company, that he, the shareholder, had at the request of the plaintiff taken shares in the company as a trustee for others, and upon the faith of the plaintiff's statement that by so doing no responsibility in respect of the shares would be incurred. It was not alleged that the plaintiff had been guilty of any fraud; his statement did not relate to any matter of fact; it did not amount to a contract of indemnity, nor to a contract that if he were a creditor of the company he would not endeavour to obtain payment from the defendant. It was quite consistent that all that was meant was, that if the defendant would allow shares to be taken for others in his name they would indemnify him against the consequences, and the defence was therefore held insufficient, although pleaded as a defence on equitable grounds. Creditor proceeding against shareholder after inducing him to become such.

The effect which a contract by a company to pay out of its funds, and those only, has in limiting the liability of the shareholders, has been already examined (e). Where such a contract has been entered into, no execution on the judgment against No remedy by creditor whose right is limited to company's funds.

(b) *Henderson v. Royal British Bank*, 7 E. & B. 356. See, too, *Daniell v. The Royal Brit. Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533. *Howard v. Shaw*, 9 Ir. Law Rep. 335, shows that a shareholder sued for a debt of the company cannot escape payment on

the ground that the company was concocted in fraud, and that its deed of settlement was invalid.

(c) See *ante*, p. 398, note (a).

(d) 2 H. & N. 311. Compare *Batty v. McCundie*, 3 Car. & P. 203; *Connop v. Levy*, 11 Q. B. 769.

(e) *Ante*, pp. 355 *et seq.*

Bk. II. Chap. 7. the company will go against the shareholders at the suit of a
Sect. 3.

— person seeking to enforce that contract (*f*).

The effect of winding-up proceedings on executions against members of companies will be noticed in the Fourth Book.

Having made these preliminary remarks on the subject of executions against shareholders generally, it is proposed to examine more in detail the law relating to proceedings against shareholders in companies governed by the Banking Act of 7 Geo. 4, the Act of 7 Wm. 4 & 1 Vict. c. 73, the Companies Clauses Consolidation Act, and other companies.

3. *Proceedings against members of particular companies.*

a) Execution against members of companies governed by 7 Geo. 4, c. 46.

Execution
against public
officer under
7 Geo. 4, c. 46.

The Banking Companies Act of 7 Geo. 4, c. 46, requires the public officers of a company governed by that Act to be members of the company (*g*), and enacts that execution upon any judgment obtained against a public officer may be issued against any member of the company (*h*). From this it follows that a public officer of a company governed by the Act in question is personally liable upon every judgment obtained against him; and that writs can issue against him grounded on such judgment, and that, so far as he is concerned, no intermediate proceeding is necessary (*i*). If, indeed, the public officer named in the judgment has ceased to be a member of the company, then, by the Act, he is only liable like other former shareholders; and upon an affidavit by him, the Court will stay execution against him until after he has been proceeded against by *scire facias* or its modern equivalent (*k*).

Liability of
shareholders
under 7 Geo. 4,
c. 46.

The Act in question, 7 Geo. 4, c. 46, allows a creditor, who has obtained judgment against the public officer to execute that judgment—

1. Against any member for the time being of the company; and in case any such execution shall be ineffectual, then

(*f*) *Hulket v. The Merchant Traders' Ass.*, 13 Q. B. 960.

(*g*) 7 Geo. 4, c. 46, § 4.

(*h*) § 13.

(*i*) *Harwood v. Law*, 7 M. & W. 203.

(*k*) See *Harwood v. Law*, 7 M. & W. 203.

2. Against any person who was a member of the company at the time the contract sued upon was entered into ; *or*

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3. Against any person who became a member at any time after such contract was entered into, but before it was executed ; *or*

4. Against any person who was a member at the time when the judgment was obtained.

But persons who are not members for the time being, and so do not fall within the first class, are only liable for three years after they have ceased to be members (*l*).

It appears, therefore, that a creditor must go first of all against the members for the time being, and that until he has done so he cannot go against late members (*m*) ; and by members for the time being are meant, not members at the time judgment was obtained against the public officer, but members at the time a *sci. fa.* or summons on the judgment is issued (*n*). Members for the time being in this sense can be proceeded against at once, and the statute expressly allows proceedings to be taken against any one or more of them. Their liability, it will be observed, is much more extensive than the liability of ordinary partners ; not being confined to debts incurred after they become partners.

A *sci. fa.* (or now a summons under R. S. C. Ord. XLII., r. 23) is the proper mode of proceeding against shareholders under this Act (*o*).

The names of the shareholders can be ascertained from the returns made to the Stamp Office (*p*).

A creditor is not bound to proceed against all the members for the time being before having recourse to former members ;

Former members.

(*l*) 7 Geo. 4, c. 46, § 13.

(*m*) Hence a late member was a competent witness for the public officer. *Needham v. Law*, 12 M. & W. 560.

(*n*) See *Dodgson v. Scott*, 2 Ex. 457. See, too, *Bradley v. Eyre*, 11 M. & W. 432, which turned on a private Act in which similar words occurred.

(*o*) *Ransford v. Bosanquet*, 2 Q. B. 972, and *Bosanquet v. Ransford*, L.C.

11 A. & E. 520, and *Cross v. Law*, 6 M. & W. 217 ; *Wittenbury v. Law*, 6 Bing. N. C. 345 ; *Williams v. Aspinall*, 7 Scott, 822, *contra*, is not to be relied upon. The rule for a *sci. fa.* against present members is absolute in the first instance, and need not be moved for in open Court. *Harrison v. Tysan*, 1 Bail Ct. Ca. 111.

(*p*) See 7 Geo. 4, c. 46, §§ 4 *et seq.*, and see *ante*, p. 149.

Bk. II, Chap. 7. but he must make every reasonable effort to obtain payment
Sect. 3.

from the first before he acquires a right to proceed against the last. Acting upon this principle, the Court allowed a *sci. fa.* to issue against a late member, although proceedings against a member for the time being were pending, evidence being given to show that nothing was to be got from him, and that evidence being uncontradicted (*q*). So in another case, a late member was allowed to be proceeded against, although some only of the members for the time being had been sued ineffectually, uncontradicted evidence being given that inquiry had been made as to the solvency of the others, and that there was reason for believing that payment could not be obtained from any of them (*r*). So it was unnecessary for the creditor to issue writs of *ca. sa.* against the existing shareholders before proceeding against former members (*s*). Moreover, a mortgagee who has obtained judgment for his debt, and has done his best to obtain payment by executing that judgment against the members for the time being, is, it seems, entitled to proceed against former members, even without realising his mortgage (*t*). On the other hand, the Court will refuse a creditor leave to proceed against a late member where there is reason to believe that satisfaction can be got with diligence from existing members (*u*); and a return of *nulla bona* to a writ of *fi. fa.* issued against the public officer, together with a loose affidavit as to the insolvency of the members for the time being, will not of itself be sufficient to satisfy the Court that payment from them cannot be obtained (*x*).

Classes of former
members.

With respect to late members, the Act, as has been seen, makes three classes of them liable, and renders it lawful for the creditor to proceed against any or all of them, not confining him to one class before having recourse to another (*y*).

(*q*) *Dodgson v. Scott*, 2 Ex. 457.

802. See, too, *Cross v. Law*, 6 M. & W. 217.

(*r*) *Harvey v. Scott*, 11 Q. B. 92;

Field v. Mackenzie, 4 C. B. 705.

(*x*) *Bank of England v. Johnson*, 3 Ex. 598.

(*s*) *Field v. Mackenzie*, 4 C. B. 732.

(*t*) *Ib.*, 4 C. B. 725. The mortgage in that case could not be realised at once without great loss.

(*y*) A rule for a *sci. fa.* against a late member must be served personally, or be shown to have reached him. *Esdale v. Smith*, 18 L. J. Ex. 120.

(*u*) *Eurdley v. Law*, 12 A. & E.

The liability of late members is, in some respects, more extensive than the liability of retired partners at common law, inasmuch as these last are not liable to be sued in respect of debts contracted before they became members. But, on the other hand, the statute limits the duration of a late member's liability to creditors to three years after retirement (z). Moreover, there is one class of late members who cannot be proceeded against by one class of their former creditors at all, viz., those members who did not become such until after the creditors' debts had arisen, and who had ceased to be members before judgment obtained against the public officer. Whether the omission of all members of this class to creditors of this class was designed or accidental is not known; but being omitted, their freedom from liability towards such creditors is complete (a).

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A creditor, being entitled to issue execution only against members for the time being, or, if necessary, against certain classes of late members, must, before he can obtain leave to proceed against any particular person, adduce some evidence to show either that such person is a member for the time being, or that he was a member at the time when the contract with the creditor was entered into, or before the same was executed, or at the time judgment was recovered (b). For this purpose recourse is usually had to the memorial of shareholders, directed to be returned to the Stamp Office, which is held to be sufficient if uncontradicted, even although it may be in some respects informal (c) or inaccurate as regards the name of the shareholder proceeded against (d). The memorial

Evidence of
membership.

(z) This limitation applies only to creditors, and does not prevent a late shareholder from being a contributory, although three years may have elapsed since he retired from the company. *Gouthwaite's case*, 3 Mc. & G. 187.

(a) See *Dodgson v. Scott*, 2 Ex. 457, and *Harvey v. Scott*, 11 Q. B. 92.

(b) In *The Bank of England v. Johnson*, 3 Ex. 598, the Court let a sci. fa. issue against a person

although there was strong evidence against his having been a member at the time alleged.

(c) See *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705 and 717; *Bosanquet v. Shortridge*, 4 Ex. 699. Compare *Prescott v. Buffery*, 1 C. B. 41, ante, p. 149.

(d) *Clowes v. Brettell*, 11 M. & W. 461, decided on a private Act. See, too, *Thompson v. Harding*, 1 C. B. N. S. 555.

Bk. II. Chap. 7. is not, however, conclusive, nor is it the only evidence of Sect. 3. membership; and it has been decided that a person whose name is omitted from the last return may nevertheless be proved, *aliunde*, to have been a shareholder when the return was made, and that, if there is a dispute as to the fact of membership, proper steps must be taken in order to have that question tried (*e*).

Effect of non-compliance with requisite formalities.

As between a creditor and an alleged shareholder, the question of membership or no membership depends entirely upon whether the requisites, which, by the company's deed, have to be complied with before a person becomes a member, have been complied with or not; and it may happen that one and the same person is not a member for the purpose of being proceeded against by a *sci. fa.*, although he may be a member for the purpose of being made a contributory on the winding up of the company (*f*).

b) Execution against members of companies governed by the Letters Patent Act.

Execution against public officer under 7 Will. 4 & 1 Vict. c. 73.

The Letters Patent Act (7 Will. 4 & 1 Vict. c. 73) does not require the public officers of a company governed by it to be members of the company; and even if they are members their liabilities are restricted to the extent specified in the letters patent of their respective companies. These circumstances alone, it is conceived, render it improper for a creditor to issue execution against a public officer of a company governed by the Letters Patent Act without an order of a Court or Judge (*g*) or a *sci. fa.*; for it is clear from the Act that he cannot be made personally liable unless he is or has been a member, and in neither case is he liable to the extent to which he would be liable at common law.

Liability of shareholders under 7 Will. 4 & 1 Vict. c. 73.

The Act in question appears to empower a creditor who has obtained judgment against the public officer of a company governed by it, to execute that judgment against all or any of

(*e*) *Bank of England v. Johnson*, 3 Ex. 598; *Prescott v. Buffery*, 1 C. B. 41.

(*f*) See *ante*, pp. 71 *et seq.*, and *Ness v. Angus*, 3 Ex. 805; *Ness v.*

Armstrong, 4 ib. 21; *Bosanquet v. Shortridge*, ib. 699, there cited. See, too, *Dodgson v. Bell*, 5 Ex. 967.

(*g*) Under R. S. C. Ord. XLII. r. 23, *ante*, p. 396.

the shareholders, or late shareholders whom he might have sued for payment at common law; the only qualifications being: 1, that a shareholder who transfers his shares continues a shareholder for all purposes of liability until the transfer has been registered; and 2, that the extent of a shareholder's liability is limited or unlimited, according to the letters patent granted to the company (*h*). This Act has not received any judicial interpretation throwing light upon the liabilities imposed by it, and it is by no means clear that the liability of an incoming shareholder is not more extensive than the ordinary liability of an incoming partner.

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The names of the shareholders can be ascertained from the returns made under the Act (*i*).

c) Execution against members of companies governed by 8 & 9 Vict. c. 16.

With respect to companies governed by the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), there is one important rule which has no analogy with anything met with in the law applicable to ordinary partnerships, or in that applicable to companies governed by the Banking Act of 7 Geo. 4, c. 46, or by the Letters Patent Act of 7 Will. 4 & 1 Vict. c. 73. The rule referred to is, that the creditors of a company governed by the Companies Clauses Act are not entitled to proceed against the shareholders personally, if payment can be obtained from the company. In other words, the creditors must have recourse to the assets of the company before they can have recourse to the shareholders individually. When, therefore, an application is made for leave to issue a *sci. fa.* or execution against a shareholder in a company governed by the Act in question, evidence must be adduced to satisfy the Court that payment cannot be obtained from the company itself as a body (*k*). The creditor need not show that there is no possibility of the company ever paying him :

Under 8 & 9
Vict. c. 16,
creditor must
first go against
the company;

and show that he
cannot obtain
payment from it.

(*h*) 7 Will. 4 & 1 Vict. c. 73, §§ 21 and 24; and see upon it *Philpston v. Egremont*, 6 Q. B. 587. The writer supposes that the returns are now made to the High Court instead of to the Court of Chancery.

(*i*) *Ib.* § 6 *et seq.*

(*k*) The same rule applied to companies governed by the repealed Acts of 7 & 8 Vict. cc. 110 and 113. It seems that the *sci. fa.* need not contain any averment that nothing

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Sect. 3.

all that the Court requires is to be satisfied that the creditor applying for leave to proceed against the shareholder has no means of obtaining *present* payment except from them individually. In order to satisfy the Court upon this head, the creditor must prove that he has made reasonable attempts to obtain payment from the company, and to discover assets *presently* available for his satisfaction, and that such attempts have been unsuccessful. A mere general assertion by a solicitor's clerk that writs of *fi. fa.* have been issued against the company and returned *nulla bona*, is not sufficient: for it is consistent with such an assertion that no attempt has been made to ascertain whether the company has any assets or not (*l*). But if attempts have been made to discover assets, and those attempts have been fruitless, and a writ of *fi. fa.* has issued against the company and been returned *nulla bona*, that will be sufficient until it is shown affirmatively that the company has assets (*m*); and even if the company has assets which have not been taken in execution, still, if the Court is satisfied that they are insufficient to satisfy the plaintiff, the *sci. fa.* will go, or leave to issue execution will be given under R. S. C. Ord. XLII., r. 23 (*n*).

Liability of
shareholders
under 8 & 9
Vict. c. 16.

By the Companies Clauses Consolidation Act, a judgment recovered against a company to which such Act applies, may, if necessary, be executed against any of the shareholders. But no shareholder is liable to a greater extent than the amount unpaid up on his shares in the company (*o*).

can be got from the company, *Hitchins v. The Kilkenny Rail. Co.*, 15 C. B. 459; but if it does, the averment may be traversed: *Marson v. Lund*, 16 Q. B. 344. See *Nixon v. Brownlow*, 1 H. & N. 405.

(*l*) See *Hitchins v. The Kilkenny Rail. Co.*, 10 C. B. 160, and 15 ib. 459; *King v. The Parental Endowment Co.*, 11 Ex. 443.

(*m*) *Rastrick v. The Derbyshire Rail. Co.*, 9 Ex. 149; *Nixon v. The Kilkenny Rail. Co.*, 1 H. & N. 47; *Hitchins v. The Kilkenny Rail. Co.*, 15 C. B. 459; *Wyll v. The Darent*

Rail. Co., 2 C. B. N. S. 110; *Ridgway v. The Security, &c., Ass. Soc.*, 18 C. B. 686. The return by the sheriff need not be filed when the *sci. fa.* is moved for: *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.*, L. R. 2 C. P. 15; and see *infra*, notes (*p*) and (*r*).

(*n*) *Ilfracombe Rail. Co. v. Lord Poltimore*, L. R. 3 C. P. 288; *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586.

(*o*) 8 & 9 Vict. c. 16, § 36. See *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47; *Guest v. Worcester*

The expression, "any of the shareholders," has been decided to mean any of the shareholders at the time execution against the company is found to be ineffectual, *i.e.*, in ordinary cases, at the time of the sheriff's return of *nulla bona* (*p*). Consequently, not only all persons who have ceased to be shareholders before judgment against the company has been recovered, but also all who have ceased to be so after that time, but before it has been ascertained that execution against the company on such judgment will prove ineffectual, are wholly exempt from liability to the judgment creditor (*q*).

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"Any of the
shareholders."

The Act requires that every shareholder intended to be proceeded against is to have sufficient notice in writing before application for leave to issue a *sci. fa.* against him is made (*r*).

Leave to issue a *sci. fa.* will be refused if the Court is of opinion that there is a clear defence to it (*s*). On the other hand, a *sci. fa.* may be dispensed with if the shareholder does not desire to contest his liability (*t*). How far these rules apply to proceedings under R. S. C. Ord. XLII., r. 23, has not been decided.

The meaning of the word shareholder in this Act of Parliament has been already examined (*u*); and it is only necessary here to observe that the company's register of shareholders, which a creditor who has obtained judgment against the company has a right to inspect (*x*), is, in the absence of

Evidence of
membership.

Rail. Co., L. R. 4 C. P. 9. In the last case the shares were not in fact paid up.

(*p*) *Nixon v. Green*, 11 Ex. 550, and 3 H. & N. 686; *Nixon v. Brownlow*, 3 H. & N. 686.

(*q*) *Ib.*

(*r*) 8 & 9 Vict. c. 16, § 36. See *Hitchins v. Kilkenny Rail. Co.*, 10 C. B. 160; *Devereux v. Kilkenny Rail. Co.*, 5 Ex. 834. See *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.*, L. R. 2 C. P. 15, and *Edwards v. Kilkenny Rail. Co.*, 1 C. B. N. S. 409, as to serving the notice and rule *nisi* on the shareholder. See, as to enforcing decrees in equity without a *sci. fa.*, *Healey*

v. Chichester and Midhurst Rail. Co., 9 Eq. 148.

(*s*) See as to the discretion of the Court, *Shrimpton v. Sidmouth Rail. Co.*, L. R. 3 C. P. 80; *Lee v. Bude, &c., Rail. Co.*, L. R. 6 C. P. 576; *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47. However, in *Guest v. Worcester Rail. Co.*, L. R. 4 C. P. 9, the Court allowed a *sci. fa.* to go although the case was clear.

(*t*) *Burke v. Dublin Trunk, &c., Rail. Co.*, L. R. 3 Q. B. 47.

(*u*) *Ante*, p. 143.

(*x*) 8 & 9 Vict. c. 16, § 36. *R. v. The Derbyshire, &c., Rail. Co.*, 3 E. & B. 784; *Meuder v. Isle of Wight Ferry Co.*, 9 W. R. 750, which

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evidence to the contrary, sufficient proof that a person whose name is on it is a shareholder (*y*). But the register is not conclusive evidence, and leave to issue a *sci. fa.* (or, it is presumed, execution, under R. S. C. Ord. XLII., r. 23) against a person who is on it will not be given if he can show that he is not a shareholder (*z*). Neither is the register the only evidence that a person is a shareholder; and a person made a member of the company by its special Act may be proceeded against accordingly, although no shares have been issued (*a*), unless he is to be regarded as having ceased to be a member (*b*). In a case where a creditor was prevented from seeing the register, a *sci. fa.* was allowed to issue against a person sworn to be a shareholder to the belief of the deponent, and which belief was founded on information from officials connected with the company (*c*).

d) Execution against members of other companies.

Liability of
shareholders
in other com-
panies.

Companies empowered by special Acts to sue and be sued, and the shareholders in which are liable for the debts of the companies, will generally be found to resemble companies governed by 7 Geo. 4, c. 46 (*d*).

Unincorporated
companies.

Execution against partners or shareholders in ordinary unincorporated companies under judgments obtained against them in the name of their firm or company is governed by R. S. C. Ord. XLVIII., rr. 8 and 9, as to which see Part., Bk. II., c. 3, § 3, p. 308 *et seq.*

Cost-book
companies.

Unregistered cost-book mining companies are partnerships, and shareholders in them may be proceeded against accordingly (*e*). But by the Stannaries Act, 1887 (50 & 51 Vict.

shows that a mandamus is not necessary. pp. 143 *et seq.*

(*y*) See 8 & 9 Vict. c. 16, §§ 8 and 29.

(*z*) *Edwards v. Kilkenny Rail. Co.*, 14 C. B. N. S. 526; *Mather v. Nat. Assoc. Investment Soc.*, ib. 676.

(*a*) *Portal v. Emmens*, 1 C. P. D. 201 and 664, *ante*, p. 143.

(*b*) *Kipling v. Todd*, 3 C. P. D. 350.

(*c*) *Rastrick v. The Derbyshire, &c., Rail. Co.*, 9 Ex. 149. See *ante*,

(*d*) See *Clowes v. Brettell*, 10 M. & W. 506; *Wingfield v. Barton*, 7 Jur. 258; *Wingfield v. Peel*, 13 L. J. N. S. Q. B. 102; and as to industrial and provident societies, *Myers v. Rawson*, 5 H. & N. 99. The 17 & 18 Vict. c. 25, on which the last case turned, has been repealed; such societies are now governed by 56 & 57 Vict. c. 39. See *infra*, p. 409.

(*e*) *Lanyon v. Smith*, 3 Best & Sm. 939; *Tredwen v. Bourne*, 6

c. 43), § 6, in the case of execution against any company to which the Act applies, the sheriff is to levy sufficient to pay all wages due at the date of the levy in addition to the judgment debt, and such wages are payable in priority to the judgment debt. Bk. II. Chap. 7.
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Shareholders in companies governed by the Companies Act, 1862, are not liable to execution on judgments against the company, but must be proceeded against under the winding-up clauses, which will be examined hereafter (*f*). Companies
governed by Act
of 1862.

Members of building societies registered under the Building Society Act, 1874, and of industrial and provident societies registered under the Industrial and Provident Societies Act, 1893, are in a similar position (*g*).

The law respecting execution against members of companies governed by the repealed Acts of 7 & 8 Vict. cc. 110 and 113, is now obsolete, and is therefore omitted (*h*).

Note on procedure by Scire facias.

In those cases in which a judgment against a company or a public officer was sought to be enforced against a shareholder, a *scire facias* was a necessary preliminary, unless there was some statutory enactment to the contrary (*i*), and a provision that execution should not issue without leave obtained by motion in open Court, was not sufficient to dispense with a *sci. fa.* (*k*). Necessity of
sci. fa.

A *sci. fa.* was necessary in the case of banking companies governed by 7 Geo. 4, c. 46 (*l*), and of companies governed by the Companies Consolidation Act (*m*); and probably also in the case of companies governed by the Letters Patent Act, 7 Will. 4 & 1 Vict. c. 73. Sci. fa. under
7 Geo. 4, c. 46,
and 8 & 9 Vict.
c. 16.

Under 7 Will. 4
& 1 Vict. c. 73.

M. & W. 461; *Newton v. Daly*, 1 Fos. & Fin. 26; *Peel v. Thomas*, 15 C. B. 714; *Toll v. Lee*, 4 Ex. 230; *Ellis v. Schmoek*, 5 Bing. 521, are instances of successful actions against individual shareholders in cost-book mining companies.

(*f*) 25 & 26 Vict. c. 89, §§ 180 and 195.

(*g*) See App. II. and III., *infra*.

(*h*) It will be found in the first edition of the present treatise, vol. i. pp. 458-462.

(*i*) *Burtlett v. Pentland*, 1 B. & Ad. 704; *Clowes v. Brettell*, 10 M. & W. 506; *Wingfield v. Barton*, 2 Dowl.

N. S. 355, and 7 Jur. 258; *Wingfield v. Peel*, 12 L. J. N. S. 102, Q. B.

(*k*) See the last three cases. A judgment obtained in a colony may be sued upon in this country in an action in the ordinary form: *Bank of Australia v. Nias*, 16 Q. B. 717.

(*l*) *Runsford v. Bosanquet*, 2 Q. B. 972.

(*m*) 8 & 9 Vict. c. 16, § 36; *Hitchins v. The Kilkenney Rail. Co.*, 10 C. B. 160; *Devereux v. The Kilkenney Rail. Co.*, 5 Ex. 834. See, as to enforcing decrees in equity, *Healey v. Chichester and Midhurst Rail. Co.*, 9 Eq. 148.

- Bk. II. Chap. 7.** Under the repealed Acts 7 & 8 Vict. cc. 110 and 113, leave to issue
Sect. 3. execution against a shareholder might be obtained without any suggestion
 or *sci. fa.* But this did not render a *sci. fa.* improper; and in point of fact
Under 7 & 8 it was very commonly had recourse to for the purpose of executing judg-
Vict. cc. 110 ments obtained against companies to which these Acts applied (*n*). A *sci.*
and 113. *fa.*, however, did not lie against the executors of a deceased shareholder (*o*).
Nature of *sci. fa.* A writ of *scire facias* is a judicial writ, and is the commencement of a
 new action, founded on a judgment already obtained. The writ states
 the recovery of the judgment, and whatever facts are necessary to show
 that the person against whom the writ is issued is liable to be proceeded
 against on that judgment; and the shareholder against whom the writ is
 issued is commanded to appear to show why the plaintiff ought not to
 have execution against him. The writ is set out in a declaration or
 statement of claim, which prays that execution may issue against the
 defendant (*p*); and which may be pleaded or demurred to in the ordinary
 way (*q*). Issue having been joined, the cause proceeds to trial (*r*). A
 judgment obtained against a defendant in a *sci. fa.* is executed like any
 other judgment. But the Court will compel the creditor to limit the
 amount for which execution is sued out to what may then be really due
 to him. This is done by putting the creditor on terms when leave to issue
 a *sci. fa.* is granted (*s*).
Irregular *sci. fa.* A *sci. fa.* issued irregularly, *e.g.*, without leave, where leave is required,
 will be set aside; but a plea to it, alleging merely an irregularity for which
 it might be set aside, is bad (*t*).

(*n*) See as to 7 & 8 Vict. c. 110,
Palmer v. The Justice Assurance
Society, 6 E. & B. 1015; *Peart v.*
The Universal Salvage Co., 6 C. B.
 478; *Thompson v. The Universal*
Salvage Co., 3 Ex. 310; *Re Weiss*,
 15 C. B. 331. And as to 7 & 8
 Vict. c. 113, see *Bendy v. Harding*,
 1 C. B. N. S. 551; *Thompson v.*
Harding, *ib.* 555; *Dossett v.*
Harding, *ib.* 524; *Morisse v. The*
Royal British Bank, 1 C. B. N. S.
 67; *Wilde v. Stanner*, 1 H. & N.
 873. See, too, *Powis v. Butler*, 3
 C. B. N. S. 645, and 4 *ib.* 469; *Fry*
v. Russell, 3 *ib.* 665.

(*o*) *Powis v. Butler*, *ubi supra*.

(*p*) See the pleadings in *Ricketts*
v. Bowhay, 3 C. B. 889, where the
 writ and declarations are set out in
 full. See, too, *Bradley v. Eyre*, 11
 M. & W. 432; *Nunn v. Claxton*, 3
 Ex. 712. In some of the forms
 the writ is directed to the sheriff,
 but in others it is directed to the

individual shareholder.

(*q*) See *Esdaile v. Trustwell*, 1
 Ex. 371; *Bank of Scotland v. Fen-*
wick, *ib.* 792; *Ness v. Fenwick*, 2
 Ex. 598; *Nunn v. Claxton*, 3 Ex.
 712, in each of which the declara-
 tion was demurred to. Several
 matters may be pleaded: *Phillipson*
v. Tempest, 8 Jur. 60. As to
 the practice and forms, see 2
 Chitty's Archbold's Practice, 14th
 ed., pp. 1285 *et seq.*, and Chitty's
 Forms thereto, 12th ed. pp. 645,
 646.

(*r*) The jury must not be share-
 holders, *Esdaile v. Lund*, 12 M. & W.
 734.

(*s*) See *Harvey v. Scott*, 11 Q. B.
 92; *Green v. Nixon*, 23 Beav. 530;
Addison v. Tate, 11 Ex. 250.

(*t*) *Marson v. Lund*, 16 Q. B.
 344; *Bradley v. Warburg*, 11 M. & W.
 452; *Ricketts v. Bowhay*, 3 C. B. 889;
Bank of Scotland v. Fenwick, 1 Ex.
 792; *Bosanquet v. Graham*, 7 Jur.

A judgment creditor of a company may issue as many concurrent writs of *sci. fa.* against as many shareholders as he thinks proper; and so long as his demand is unsatisfied, a defence by any shareholder that the plaintiff is proceeding against others is bad (*u*). Even the circumstance that judgments have been already obtained against them on the writs issued against them, affords no ground of defence; for such judgments do not extinguish the right conferred upon the creditor by the prior judgment obtained against the company (*x*). Even before pleas in abatement were abolished it was decided that to a *sci. fa.* against a shareholder the non-joinder of other persons liable to be proceeded against, could not be pleaded in abatement; and if one *sci. fa.* issued against several shareholders, a declaration upon it against some of them only was not bad on demurrer, even if it were irregular (*y*). Neither is it any objection to a *sci. fa.* by a creditor against a shareholder that other creditors are suing him or are in a position to issue execution against him (*z*); although when he has paid the full amount to which he is liable, no other creditor can extract more from him (*a*).

A rule for a *sci. fa.*, or an application for leave to issue execution (in those cases in which no *sci. fa.* is necessary) may, it seems, be moved for, or made, more than once by the same creditor against the same shareholder for the same debt, if the same rule or application has been allowed to drop for any satisfactory reason, or has been refused upon some technical ground which has been removed. At the same time the maxim, *nemo debet bis vexari pro eadem causâ*, is applicable, unless some good reason to the contrary can be shown (*b*).

A judgment against a company, the shareholders of which are liable to execution on the judgment, may be executed against them, although the creditor has issued an *elegit* against the company, and has obtained partial satisfaction by an extent under the writ (*c*). The extent does not, in these cases, satisfy the debt. If the creditor has received nothing from the extent, he is entitled to execution for his whole demand; and if he has obtained any fruits from the extent, he is still entitled to execution for so much as remains due (*d*). If the land extended is of small value compared

831, Q. B. See as to suing out a *sci. fa.* on a judgment entered up for costs, *Farmer v. Mottram*, 6 Man. & Gr. 684.

(*u*) See *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586; *Nixon v. Brownlow*, 1 H. & N. 405; *Nunn v. Lomer*, 3 Ex. 471. Compare *Esdaile v. Trustwell*, 2 Ex. 312, and *Esdaile v. Lund*, 12 M. & W. 607.

(*x*) *Burmester v. Crofton*, 3 Ex. 397.

(*y*) *Fowler v. Rickerby*, 2 Man. & Gr. 760, decided on 7 Geo. 4, c. 46. See the argument in *Esdaile v. Lund*, 12 M. & W. 607.

(*z*) *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586.

(*a*) *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47.

(*b*) See upon this, *Corder v. The Universal Gas Light Co.*, 6 C. B. 190 and 554; *Field v. Mackenzie*, ib. 384; *Dodgson v. Scott*, 2 Ex. 457. *Edwards v. Cameron's, &c., Rail. Co.*, 15 Jur. 470, Ex., is a strong authority for not allowing two applications.

(*c*) *Addison v. Tate*, 11 Ex. 250; *R. v. The Derbyshire Rail. Co.*, 3 E. & B. 784.

(*d*) See *Addison v. Tate*, 11 Ex.

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Concurrent writs
of *sci. fa.*

Applications for
rule for *sci. fa.*

Sci. fa. after
elegit.

Bk. II. Chap. 7. with what is due to the creditor, he is entitled to execution against the shareholders without delay; but if the land is of such a value that the creditor will in a short time be able to obtain payment without having recourse to the shareholders, the Court will not, as a matter of course, let immediate execution against them be issued (e).

Validity of judgment cannot be questioned on *sci. fu.* Except where judgment has been obtained by fraud, the validity of a judgment which has been recovered against a company or its public officer, cannot be impeached by a shareholder who is proceeded against by *sci. fu.*, for, excepting in cases of fraud, nothing is admissible as a defence to a *sci. fu.* which might have been relied on as a defence to the action on the judgment in which the *sci. fu.* issues (f). The judgment is conclusive, and nothing can be set up as a defence to a *sci. fu.* upon it, except some matter which is consistent with the validity of the judgment itself (g).

Bradley v. Eyre. Upon the same principle it seems that if judgment is obtained against a person sued as a public officer, a shareholder cannot plead as a defence to a *sci. fu.*, that the person against whom the judgment has been obtained was not the representative of the company (h). In such a case application should be made to set aside the judgment (i).

250, from which it appears that the *sci. fu.* should state what has been done under the *elegit*, and the amount if any obtained by it.

(e) See *Addison v. Tate*, 11 Ex. 250.

(f) See *per* Lord Mansfield in *Cook v. Jones*, Cowp. 727. There is perhaps another exception, viz., in the case of a consent judgment which is in substance *ultra vires* the

company. See *Great North Western, &c., Rail. Co. v. Charlebois* [1899], A. C. 114, *ante*, p. 398.

(g) See the cases noticed, *ante*, pp. 397 *et seq.*

(h) See *Bradley v. Eyre*, 11 M. & W. 432; *Fowler v. Rickerby*, 2 Man. & Gr. 760.

(i) *Ib.*, and *Bosanquet v. Graham*, 7 Jur. 832, and 6 Q. B. 601, *note*.

BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF COMPANIES BETWEEN THEMSELVES.

CHAPTER I.

OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE AFFAIRS OF A COMPANY.

ONE of the peculiarities of companies, as distinguished from partnerships, is that the management of a company's business is entrusted to a few chosen individuals, and that the shareholders are deprived of that right of personal interference which is enjoyed by the members of ordinary firms (*a*). The members of companies form two bodies, whose interests are or should be the same, but whose powers and functions are different; the one body consists of the directors, in whom the general powers of management are vested; and the other body consists of the shareholders, to whom the directors are accountable, and by whom they are generally appointed. Each of these bodies has its own sphere of action, and its own rights and duties, as will be seen more particularly hereafter.

SECTION I.—OF DIRECTORS AND THEIR POWERS.

Where there is no statutory or other provision regulating the constitution and powers of the managing body, the majority of the shareholders of the company must determine how its affairs are to be conducted, and to whom, and under what restrictions, the management of those affairs shall be

(*a*) See *Burnes v. Pennell*, 2 H. L. C. 520 and 521.

Bk. III. Chap. 1. entrusted (b). This is the rule which prevails in cost-book
Sect. 1.

mining companies (c), and it is not easy to conceive what, except the will of the majority, can determine a matter of this description under the circumstances now supposed.

Number of
directors.

The number of persons composing the managing body of a company is generally fixed by the company's special Act, charter, deed of settlement, or regulations, and the number making a *quorum* is also usually thereby fixed. As a general rule, a power entrusted to a given number of individuals cannot be properly exercised by any less number; and there are several cases in which this rule has been applied to companies, and in which the acts of directors have been held invalid on the ground that they were not done by the requisite

Varying the
number.

number of directors (d). But it does not therefore follow that the number of directors, as originally fixed, cannot be altered by the majority of a meeting of the shareholders; and where the number is not fixed by the Legislature or the Crown, it seems that the shareholders may alter it (e). Even where the number is fixed by an Act of Parliament or a charter, the Act or charter may be so worded as to be in this respect directory only (f).

Who are
directors.

It is to be observed that the directors of a company are all those persons who are constituted directors by a company's Act, charter, or deed of settlement, and not only such of them as choose to act.

Persons deemed
to be directors.

Sometimes provision is made for the transaction of business by persons who are to be deemed to be directors until directors are appointed. Such a provision does not necessarily make such persons directors for all purposes; and a clause to the effect that two directors shall be a *quorum* has been held not

(b) Agreements by directors depriving the shareholders of this power are invalid, *James v. Eve*, L. R. 6 H. L. 335. The powers of majorities will be examined hereafter, pp. 437 *et seq.*

(c) See Tapping on the Cost-Book, p. 64.

(d) See *ante*, p. 205. As to the power of directors to delegate their

authority, see p. 206. As to the need for directors to act at a meeting, and the calling of such meeting, see *ante*, p. 208.

(e) *Smith v. Goldsworthy*, 4 Q. B. 430.

(f) *Thames Haven, Dock, &c., Co. v. Rose*, 4 Man. & Gr. 552. See, too, *Bargate v. Shortridge*, 5 H. L. C. 297, and *ante*, p. 228.

to apply to persons who were to be deemed to be directors (*g*). Bk. III. Chap. 1. Sect. 1.
 So a clause as to the qualification of directors has been held — — — — —
 not to apply to similar persons (*h*).

Generally speaking, the members of the managing body are required to possess certain qualifications, and to be appointed Qualifications of directors.

in some prescribed manner. But it by no means follows that persons who are in fact acting as duly qualified directors will be prevented from doing so, simply because they have been irregularly appointed (*i*). Still less does it follow that Irregular appointments. the irregularity of their appointment will render all their acts

null and void. Persons dealing with them as directors *bonâ fide*, and without notice of the irregularity, are entitled to treat them as the agents of the company, and to hold the company bound by their acts, as if they were its duly appointed directors (*k*). But, as between themselves and the shareholders, the irregularity may be of greater importance, and it has been held that persons *de facto*, but not *de jure*, directors cannot allot shares (*l*), make valid calls (*m*), or forfeit shares (*n*).

A provision in the company's regulations, rendering valid what Validating clauses. may be done by persons acting as directors, notwithstanding the subsequent discovery of a defect in their appointment (*o*), applies not only as between the company and persons dealing with it, but also as between the company and its shareholders (*p*); but apparently such a clause will not apply

(*g*) *London and Southern Counties Land Co.*, 31 Ch. D. 223.

(*h*) *Lord Claud Hamilton's case*, 8 Ch. 548, and others of that class noticed *infra*, Bk. IV., under the head Contributors.

(*i*) See *Foss v. Harbottle*, 2 Ha. 461, and *Mozley v. Alston*, 1 Ph. 790. These cases will be noticed hereafter.

(*k*) See as to this, *ante*, pp. 213 and 218 *et seq.*

(*l*) *London and Southern, &c., Land Co.*, 31 Ch. D. 223.

(*m*) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151. See on this case *York Tram. Co. v. Willows*, 8 Q. B. D. 685; *London and Southern, &c., Land Co.*, 31 Ch. D. 223, and

Dawson v. African, &c., Trading Co. [1898], 1 Ch. p. 13. See, too, *Miles v. Bough*, 3 Q. B. 845.

(*n*) *Garden Gully, &c., Co. v. McLister*, 1 App. Ca. 39.

(*o*) As in Companies Clauses Consolidation Act, 1845, § 99, and Companies Act, 1862, § 67, and Table A., art. 71. Notice that § 67 was not cited in *London and Southern, &c., Land Co.*, 31 Ch. D. 223, and see *Hallows v. Fernie*, 3 Ch. p. 473.

(*p*) *Dawson v. African, &c., Trading Co.* [1898], 1 Ch. 6, call good though a director had ceased to hold office through having parted with his qualification shares. See, too, *Murray v. Bush*, L. R. 6 H. L.

Bk. III. Chap. 1. between the company and its shareholders when the defect
Sect. 1. was known at the time when the act in question was done (*q*).

Denying qualification.

Directors are supposed to know the regulations of their own company (*r*); and it might be supposed that if a person became a director and acted as such, he would not be allowed to take advantage of the fact that he was not duly qualified to act in that capacity; but the decisions on this subject are not in accordance with this view. As will be seen hereafter (*s*), the decisions are to the effect that a person may act as a director and be required to hold a certain number of shares as a qualification for his office, and still be at liberty, if the shares have not been allotted to him, to show that he did not in fact hold such shares, or agree to take them (*t*), unless the company's regulations are specially worded so that the acceptance or holding of the office must imply an agreement to take the qualification shares from the company, if not acquired from some other source within a given or reasonable time (*u*). So, too, if a company's special Act is so worded as to make a director a shareholder, in respect of the number of shares necessary to qualify him, he will be a shareholder in respect of that number of shares whether any definite shares have been allotted to him or not (*x*).

The provisions of the Companies Act, 1900, relating to this subject, will be noticed hereafter (*y*).

A provision that no person shall be eligible as a director unless he holds a certain number of shares, only applies to persons who are elected as directors; it does not apply to persons who are named as directors in the articles of association or to persons who sign a company's memorandum of

37; *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(*q*) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, and *Dawson v. African, &c., Trading Co.* [1898], 1 Ch. p. 13; *Brilport Old Brewery Co.*, 2 Ch. 191; *Harben v. Phillips*, 23 Ch. D. pp. 27, 28.

(*r*) See *per* Lord Westbury in *Lane's case*, 1 De G. J. & S. 506. Compare *Marquis of Abercorn's case*, 4 De G. F. & J. 78.

(*s*) See *infra*, Bk. IV., c. 1, §§ 13, 6.

(*t*) *Wheal Buller Consols*, 38 Ch. D. 42, and other cases of that sort.

(*u*) As in *Isaac's case* [1892], 2 Ch. 158.

(*x*) *Portal v. Emmens*, 1 C. P. D. 664 and 201, and see also *Kincaid's case*, 11 Eq. 192; *Forbes' case*, 19 Eq. 353; *Purcell's case*, 29 W. R. 170. Compare *Kipling v. Todd*, 3 C. P. D. 350.

(*y*) See *infra*, pp. 466, 467.

association, and who by that fact alone are the persons to act as directors until others are appointed (z). Bk. III. Chap. 1.
Sect. 1.

Where a person is required to hold a certain number of shares as a qualification for the office of director, those shares may apparently (a) be shares which have been issued as fully paid up (b).

A director who has the requisite number of shares standing in his name is qualified for the office, although he may have mortgaged his shares (c), or have no beneficial interest in them (d); and this is so even where the qualification shares are to be held by the directors "in their own right" (e). It is also sufficient if the shares are standing in his name jointly with other persons (f). Legal title to
shares
sufficient.

If the holding of qualification shares is a condition precedent to election as a director, the election of an unqualified person is void (g). Qualification
condition
precedent.

Whether a person once a director has or has not ceased to be so depends (except in the case of his death) upon the regulations of the company (h). If a person holding one office accepts another incompatible with it, he thereby vacates the first office (i); in the absence of any provision to the contrary, it is conceived that this rule applies to directors who accept another office under the company incompatible with that of director (ii). A director who becomes bankrupt or ceases to attend to his duties does not thereby necessarily vacate his office (k). If the company's regulations provide that the office of a director shall Vacancies.

(z) *Stock's case*, 4 De G. J. & Sm. 426; *Lord Claud Hamilton's case*, 8 Ch. 548; *Forbes' case*, ib. 768; and see *Cotterell's case*, 11 W. R. 13.

(a) See *Currie's case*, 3 De G. J. & Sm. 367, *contra*.

(b) See *Brown's case*, 9 Ch. 102.

(c) *Cumming v. Prescott*, 2 Y. & C. Ex. 488.

(d) *Bainbridge v. Smith*, 41 Ch. D. 462; *Cooper v. Griffin* [1892], 1 Q. B. 740; and *Howard v. Sadler* [1893], 1 Q. B. 1, a case of a special Act.

(e) *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610, and cases in the last note.

(f) *Dunster's case* [1894], 3 Ch. 473.

L. C.

(g) *Hamley's case*, 5 Ch. D. 705; *Jenner's case*, 7 Ch. D. 132; and see *Barber's case*, 5 Ch. D. 963. As to voting for an unqualified person, see *R. v. Tewkesbury*, L. R. 3 Q. B. 629.

(h) *Phelps v. Lyle*, 10 A. & E. 113.

(i) Comyns' Digest, "Officer" (B. 6); *Milward v. Thatcher*, 2 T. R. 81; *Iron Ship Coaling Co. v. Blunt*, L. R. 3 C. P. 484.

(ii) See *Iron Ship Coaling Co. v. Blunt*, L. R. 3 C. P. 484; *Eales v. Cumberland Black Lead Co.*, 6 H. & N. 481.

(k) *Phelps v. Lyle*, 10 A. & E. 113; and see *Wilson v. Wilson*, 6 Scott, 540.

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be vacated if he absents himself from directors' meetings for a certain period, the period will run from the date of the first meeting from which the director is voluntarily absent without leave and not from the date of the last meeting which he attends (*kk*). A regulation that the office of a director shall be vacated if he ceases to hold the necessary qualification does not apply to a director who has never acquired the qualification (*l*).

Filling up
vacancies.

The power to fill up casual vacancies is frequently given to the remaining directors; in such a case they can fill up a vacancy although a general meeting of shareholders has been held since the vacancy occurred (*m*). But if the number of continuing directors is less than the minimum number requisite for the transaction of any business, they cannot fill up the vacancy (*n*). The rules of the company may, however, allow the continuing directors, however few, to fill up a vacancy, although not to transact any other business until the vacancy is filled up (*o*). A casual vacancy is any vacancy caused otherwise than by retirement in rotation according to the regulations of the company (*p*).

Removal of
directors.

Power to remove directors is often expressly conferred on the shareholders (*q*). It has not yet been decided whether when there is no such express power there is an implied power in the shareholders of a company to remove a director from his office by a resolution duly passed at a meeting properly convened for the purpose, but the better opinion seems to be that there is (*r*). If, however, a director is appointed for a definite period, he cannot be removed before that period has expired unless there is some special provision to that effect (*s*), or unless he has been guilty of such misconduct as justifies his

(*kk*) *McConnell's Claim* [1901],
1 Ch. 729.

(*p*) *Munster v. Cammell Co.*, 21
Ch. D. 183.

(*l*) *Salton v. New Beeston Cycle Co.* [1899], 1 Ch. 775. See, too, *Bainbridge v. Smith*, 41 Ch. D. 462, where such a provision was held not to apply to a managing director appointed under a contract.

(*q*) There is power to remove under the Companies Clauses Act, 1845. See *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 820.

(*m*) *Munster v. Cammell Co.*, 21 Ch. D. 183.

(*r*) See *Browne v. La Trinidad*, 37 Ch. D. 1, and *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339, and the case in the last note.

(*n*) See *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(*s*) *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1. Compare the last note.

(*o*) As in *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

removal (t); but if his period of service is fixed only by the company's regulations, and the company has power to alter its regulations, it can alter them and take power to remove the director and then act on that power (u). Even if there is no power to remove a director, the Court will not grant an injunction to restrain the company from preventing a director acting as such, if the shareholders in general meeting have expressed a desire that he is not to continue a director (x). Where the shareholders have power to remove a director for "any reasonable cause," the shareholders are themselves the judges as to what is and what is not a reasonable cause for removal; and their decision will not be interfered with if they act fairly and in good faith (y).

In the absence of any regulation to the contrary it is apprehended that a director may resign his office when he pleases, but, unless otherwise provided, it seems that his resignation to be effectual must be made to the company in general meeting (z). Unless the company's regulations require a resignation to be accepted, it is complete when duly communicated (a), and when complete it cannot be withdrawn even with the consent of the company (b); there must be a re-election (bb).

Directors have no power to vote themselves fees for salaries or other remuneration for their services beyond what the constitution of the company may provide (c).

If a director's remuneration is fixed at so much for a certain period it is not subject to apportionment, consequently if he

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Resignation.

Remuneration
of directors.

(t) In *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339, a managing director was dismissed from that office, before the expiration of his appointment, for misconduct, and the Court held that he was rightfully dismissed.

(u) *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1.

(x) *Bainbridge v. Smith*, 41 Ch. D. 462; *Harben v. Phillips*, 23 Ch. D. 14.

(y) *Underwick v. Snell*, 2 Mc. & G. 216. See the cases as to expelling members of clubs, *Baird v. Welle*, 44 Ch. D. 661; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Fisher v. Keane*, 11 ib. 353; *Labouchere v.*

Wharnclyffe, 13 ib. 346; and as to removing persons from offices, *Osgood v. Nelson*, L. R. 5 H. L. 636; *Dean v. Bennett*, 6 Ch. 489; *Hayman v. Gov. of Rugby School*, 18 Eq. 28.

(z) *Municipal Freehold Land Co. v. Pollington*, 59 L. J. Ch. 734.

(a) See *Maitland's case*, 4 De G. M. & G., p. 775; *Finch v. Oake* [1896], 1 Ch. 409.

(b) *R. v. Mayor of Wigan*, 14 Q. B. D. 908.

(bb) *Finch v. Oake* [1896], 1 Ch. 409.

(c) See *Evans v. Coventry*, 8 De G. M. & G. 835, decree, clause 3; *George Newman & Co.* [1895], 1 Ch. 674. See, too, *Burland v. Earle*,

Bk. III. Chap. 1. ceases to be a director during the currency of the period, he is
Sect. 2. not entitled to any remuneration in respect of that period (*d*).

A provision that directors are to be paid in each year a percentage on the net profits of the company for the year applies only to profits made by the company as a going concern, and does not entitle the directors to a percentage on the profits realised by a sale of the company's undertaking (*e*).

Directors can waive their right to remuneration by a resolution in which they all concur; such a resolution will be binding on them, at all events if passed before any remuneration is due to them (*ee*).

If a claim be made against the company by a director, or by a person to whom he has assigned his fees, to recover what is due in respect of his fees, the company is entitled to set off against such claim what is due to it from the director in respect of his qualification shares (*f*).

The powers of directors as agents of the company have been already examined (Bk. II. c. 2 and 3); their powers to call meetings, allot shares, make calls, forfeit shares, will be noticed hereafter when treating of those subjects.

SECTION II.—OF SHAREHOLDERS AND THEIR POWERS.

The shareholders of a company cannot usually exercise any control over the management of its affairs, except at meetings duly convened; for the directors of a company are subject to the control not of the individual shareholders, but of the company; and where the management of the directors is complained of, an aggrieved shareholder should seek redress through the

Times, 11th Nov., 1901, and *infra*, ch. 2, § 3.

(*d*) *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339, where a director was rightfully dismissed; *Salton v. New Beeston Cycle Co.* [1899], 1 Ch. 775, where the company was wound up; *Iuman v. Ackroyd and Best, Ltd.* [1901], 1 K. B. 613, where a director resigned. *McConnell's Claim* [1901], 1 Ch. 728, where a director lost his office by

absenting himself from directors' meetings. Compare form of article in *Swabey v. Port Darwin Gold Mining Co.*, 1 Megone, Comp. Cases, 385.

(*e*) *Frames v. Bultfontein Mining Co.* [1891], 1 Ch. 140; and see *Ex parte Kemp* [1894], 3 Ch. 690.

(*ee*) *McConnell's Claim* [1901], 1 Ch. 728; *Lambert v. Northern Rail. of Buenos Ayres*, 18 W. R. 180.

(*f*) *Salton v. New Beeston Cycle Co.* [1899], 1 Ch. 775.

company, and induce it to call the directors to account (g). As Bk. III. Chap. 1.
Sect. 2. will, however, be seen hereafter, if the directors are doing that which the shareholders cannot sanction, or that which they have by a proper resolution forbidden, the dissentients may obtain redress by legal proceedings (h).

It may, however, happen that the constitution of a company is such that the shareholders are deprived of all control over the managing body in matters not foreign to the objects of the company. Where this is the case, the managers have it in their power to disregard the wishes of the shareholders as to all such matters (i).

Individual shareholders, being comparatively powerless, Meetings of shareholders. provision is generally made for bringing them together at meetings, and it is not a little important that the right to convene them should to some extent, at all events, be exercisable by the shareholders themselves. If matters are in such a state that nothing can be done without a meeting, and there is no express power to call one, it would seem necessary to imply a power in any shareholder to convene one. This, however, is a case which can seldom happen. It more commonly happens that there is a power to convene a meeting, but that those who have the power will not exercise it. In Interference of Court with meetings. cases of this kind it has been held that, where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the Court will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those entrusted with the management of the affairs of the company (k). So where directors give notice that a meeting will be held on a day when they know that a large number of shareholders will not be in a position to vote, the Court will interfere and restrain such an abuse of power (l). Again, if directors convene a meeting to pass resolutions favourable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a

(g) See *Orr v. Glasgow Rail. Co.*,
3 McQu. 799.

(h) See *infra*, ch. 9, § 2.

(i) *Spurgin v. White*, 2 Giff. 473,
is an instance.

(k) *Foss v. Harbottle*, 2 Ha. 461;
Isle of Wight Rail. Co. v. Tahourdin,
25 Ch. D. 320.

(l) *Cannon v. Trask*, 20 Eq. 669.

Bk. III. Chap. 1. circular which is misleading, and which contains statements
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- calculated to obtain proxies in their favour without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to entrust their votes, the Court will grant an injunction to restrain the holding of the meeting or to restrain the directors from laying such resolutions before the meeting (*m*).

The Court, however, is very reluctant to interfere with the holding of meetings of shareholders, especially when they are called for the purpose of investigating and controlling the conduct of the managing body; and the Court will not interfere to restrain such a meeting simply because the notice convening it is badly framed, and invites the meeting *inter alia* to pass resolutions which would be invalid if passed (*n*); for the meeting might take some other legal course, *e.g.*, pass some amended resolution which would be valid.

Resolutions of meetings.

In order that a resolution come to at any meeting, whether of directors or of shareholders, may have any legal effect, it is necessary that the meeting shall be duly convened; that a proper number of persons shall be present (*o*), and there must always be two at least (*p*); that the resolution should relate to a matter upon which the meeting is competent to pass a resolution; and that the resolution should be duly passed.

In order that a meeting may be duly convened, it is necessary that it be convened (1) by those who have a right to convene it, (2) at a proper time, (3) at a proper place, and (4) by a proper notice.

Persons to convene.

The persons entitled to convene a meeting have been alluded to already; and it is only necessary to add that a meeting convened by the proper persons will not be incompetent to transact business simply because they may themselves have been irregularly convened to consider whether a meeting shall be called or not (*q*). If, however, the proper persons have never met together to consider the desirability of calling the meeting or the resolutions to be submitted to it, and the notices have

(*m*) *Jackson v. Munster Bank*, 13 L. R. Ir. 118. *Teague*, 5 H. & N. 151, and other cases, *ante*, p. 208.

(*n*) *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320. (*p*) *Sharp v. Dawes*, 2 Q. B. D. 26.

(*q*) *Browne v. La Trinidad*, 37 Ch. D. 1.

(*o*) See *Howbeach Coal Co. v.*

been sent out by the secretary after informally consulting some of such persons who left the matter in his hands, the Court will, at all events in matters of importance, refuse to give effect to resolutions passed at the meeting (*r*).

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As regards time: where there is no express provision, a Time. reasonable time must be given (*s*); and perhaps if the time were unreasonably short and were made so purposely, the Court might restrain the holding of the meeting. But if a meeting is held, and no objection is taken to the shortness of the notice convening it, the Court will not interfere (*t*). Where the time for holding a meeting is prescribed, such time must be observed; and there are instances in which resolutions of meetings have been held invalid on the ground that the meetings were not held at the proper times (*u*).

If notice of "at least" so many days is required the prescribed number of days must be clear days, *i.e.*, exclusive of the day of notice and the day of meeting (*x*). If the notice is given by advertisement, the day of notice is the day on which it appears in the papers (*y*). So, too, in calculating the time for holding a meeting, where an interval of not less than a certain number of days is required to elapse between one meeting and another, the rule is that the prescribed number of days must be clear days, *i.e.*, exclusive of the days of the meetings (*z*).

Time—how
calculated.

As regards place: where no place is prescribed, it is conceived that any reasonably convenient place of meeting may be fixed. The Court would probably interfere if a place were purposely fixed at which it was known shareholders could not attend.

Place.

A meeting of shareholders (*a*) is not duly convened unless every person entitled to attend has notice not only of the time and place at which but also of the purposes for which, it is to be held, so that he may exercise his own judgment whether he will attend

Notice of object
of meeting.

(*r*) *State of Wyoming Syndicate* [1901], 2 Ch. 431; *Haycraft Gold Reduction, &c., Co.* [1900], 2 Ch. 230.

Dale, &c., Lime Co., 31 Ch. D. 211.

(*s*) *Browne v. La Trinidad*, 37 Ch. D. 1. As to a meeting of directors, see *Ex parte Smith*, 39 Ch. D. 546.

(*x*) *R. v. Justices of Shropshire*, 8 A. & E. 173, and case in next note.

(*t*) *Browne v. La Trinidad*, 37 Ch. D. 1.

(*y*) *Mercantile Investment, &c., Co. v. International Co. of Mexico* [1893], 1 Ch. pp. 488, 489, note.

(*u*) *Railway Sleepers Supply Co.*, 29 Ch. D. 204. Compare *Miller's*

(*z*) *Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(*a*) The purpose need not be stated in a notice calling a meeting

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or not; and there are numerous cases in which resolutions have been held invalid on the ground that insufficient notice was given of an intention to submit the matters to which they relate to the meeting at which they were passed (b). If the notice states the purpose it need not state why a meeting is necessary (c), but the purpose must be fairly disclosed (d), and if a director has a pecuniary interest in the matter of the resolution the notice should disclose the fact (e). A notice may be good in part and bad in part, and is not wholly invalid because it extends to something which cannot be done (f).

Notice not
required to
appoint a
liquidator.

As soon as a resolution for a voluntary liquidation has been passed at a meeting duly convened for the purpose, it is open to any one at the meeting, without notice, to propose the appointment of a liquidator (ff).

Conditional
notice bad.

The notice must not be conditional (g), but a notice that a meeting will be held on a particular day unless notice to the contrary is given is good (h); as also is a notice of two meetings to be held in immediate succession to consider two alternative resolutions, one at each meeting, although it states that the second meeting will only be held if the first resolution is not passed at the first meeting (i).

A person who attends a meeting cannot dispute the validity of what is done on the ground that he had not due notice of the time and place at which the meeting was about to be held; and if all entitled to notice have it in fact, but not in the precise form in which it ought to have been given them, the proceedings of the meeting will not necessarily be invalid (k). But still it is absolutely requisite for the protection of those

Every one
entitled to be
heard must have
an opportunity
of being heard.

of directors, *La Compagnie de Mayville v. Whitley* [1896], 1 Ch. 788; or other select body, *R. v. Pulsford*, 8 B. & C. 350.

(b) A leading case on this head is *Bridport Old Brewery Co.*, 2 Ch. 191. See also *Garden Gully Co. v. McLister*, 1 App. Ca. 39.

(c) *Grant v. United Kingdom Switchback, &c., Co.*, 40 Ch. D. 135.

(d) *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 358.

(e) *Ib.*, and *Tiessen v. Henderson* [1899], 1 Ch. 861.

(f) *Cleve v. Financial Corporation*, 16 Eq. 363; *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320.

(ff) *French Tubeless Tyre Co.* [1900], 1 Ch. 408.

(g) *Alexander v. Simpson*, 43 Ch. D. 139.

(h) *Espuela Land and Cattle Co.* W. N. 1900, p. 139.

(i) *Tiessen v. Henderson* [1899], 1 Ch. 861.

(k) See *British Sugar Refining Co.*, 3 K. & J. 408, and *Henderson v. Bank of Australasia*, 45 Ch. D. 330.

who are to be affected by the resolutions of others, that such resolutions shall have no effect unless all entitled to a voice in making them had an opportunity of expressing their views (*l*). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a *quorum* assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed (*m*).

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The mode in which notice is to be given varies with almost every company. Such statutory enactments as exist upon the subject will be noticed hereafter. The only general rule which can be laid down is, that notice must be given in the manner prescribed by each company's Act, charter, deed of settlement, or regulations. It seems that it is not necessary to give notice of the holding of an adjourned meeting to the persons entitled to attend it; it is apparently sufficient if they had notice of the holding of the original meeting (*n*). But nothing can, without notice, be transacted at an adjourned meeting except the unfinished business of the first meeting (*o*). If the original meeting be irregularly called, the adjourned meeting is also irregular (*p*).

Mode of giving
notices of
meetings.

Adjourned
meeting.

There are two kinds of meetings, viz., *ordinary* and *extraordinary*, or, as they are sometimes called, *general* and *special*. Ordinary or general meetings are usually held at stated times, and for the transaction of business generally. Extraordinary or special meetings are held as occasion may require, for the transaction of some particular business, which ought to be specified in the notice convening the meeting. A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative (*q*); and although such resolution may

Ordinary and
extraordinary
meetings.

Nature of busi-
ness should be
specified.

Wall v. London and Northern Assets Corp. [1898], 2 Ch. 469.

(*m*) *Moore v. Hammond*, 6 B. & C. 456.

(*n*) See *Wills v. Murray*, 4 Ex. 843, 862; *Scadding v. Lorient*, 3 H. L. C. 418.

(*o*) *R. v. Grimshaw*, 10 Q. B. 747.

(*p*) *Portuguese Consol. Copper Mines, Ltd.*, 42 Ch. D. 160.

(*q*) *Bridport Old Brewery Co.*, 2 Ch. 191; *Imp. Bank of China v. Bank of Hindustan*, 6 Eq. 91; *Anglo-Californian Gold Mining Co. v. Lewis*, 6 H. & N. 174; *Stearic Acid Co.*, 9 Jur. N. S. 1066, V.-C. K. and ante, p. 424, notes (*c*) (*d*) and (*e*).

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Confirmatory
meetings.

One meeting may
be both ordinary
and extraordi-
nary.

Bye-laws.

have been confirmed at a subsequent ordinary meeting, it will still be invalid unless it might have been properly passed in the first instance at an ordinary meeting, without previous notice of any intention to enter upon the matter to which the resolution relates (*r*): and if a meeting is convened to confirm resolutions previously passed, the notice ought to state those resolutions or their effect (*s*); it is irregular to propose an amendment to the resolutions which the meeting is called to confirm (*t*). A notice that if certain resolutions are passed they will be submitted for confirmation on a day named, will be invalid unless either a further notice of the passing of the proposed resolutions is sent (*u*), or the notice says that the confirmatory meeting will be held unless notice to the contrary is previously sent (*x*).

One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given (*z*). If an ordinary meeting is held and adjourned the adjourned meeting continues to be an ordinary meeting, although special notice is given that it is about to be held for special business (*a*).

The power of making bye-laws for the regulation of the affairs of a company is not unfrequently reposed in its shareholders: and it is not uncommonly required that all bye-laws shall be sealed with the seal of the company. In such a case nothing which is not so sealed can be regarded as a bye-law (*b*); nor is an unsealed resolution passed at a meeting of the shareholders of an incorporated company, equivalent to a contract under the seal of such company (*c*). At the same time it is clear that, as a general rule, the resolutions of

(*r*) *Lawes' case*, 1 De G. M. & G. W. N. 1900, p. 139.
421.

(*s*) *Dean v. Bennett*, 6 Ch. 489,
and 9 Eq. 625.

(*t*) *Wall v. London, &c., Corp.*
[1898], 2 Ch. 469.

(*u*) *Alexander v. Simpson*, 43
Ch. D. 139. Compare *Tiessen v.*
Henderson [1899], 1 Ch. 861.

(*x*) *Espuela Land and Cattle Co.*,

(*z*) See *Cutbill v. Kingdom*, 1 Ex.
494; *Graham v. Van Diemen's Land*
Co., 1 H. & N. 541.

(*a*) *Wills v. Murray*, 4 Ex.
843.

(*b*) *Dunston v. Imperial Gas Co.*,
3 B. & Ad. 125.

(*c*) *Ib.*, and see *ante*, p. 270.

meetings of members of a body corporate do not require to be sealed in order to be binding on its members, as between themselves, and as members. Acts relating to the internal affairs of a corporation, affecting members only, and affecting them merely as members, do not in general require the common seal to render them valid (*d*). 11k. III. Chap. 1.
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Bye-laws not warranted by the authority which empowers them to be made, are altogether illegal (*e*).

It is the duty of the chairman to preserve order, to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained; but he cannot stop the meeting at his own will and pleasure; if he purports to do so the meeting may elect another chairman, and finish the business for which it was convened (*f*). When the views of the minority have been fairly and reasonably heard he may, with the sanction of the meeting, declare the discussion closed, and put the question to the vote (*g*). If the company's regulations empower him to adjourn a meeting with the consent of the members present, he is not bound to do so even though the majority desire it, and a resolution carried after he has rejected a motion for adjournment will, if otherwise in order, be valid (*h*). He has no casting vote unless one be given him by the company's regulations (*i*). If he has a casting vote, and the votes given will be equal if certain votes which are challenged are invalid, he may give his casting vote contingently, and if the votes challenged are subsequently disallowed, the casting vote so given will be valid (*k*). Chairman.
Casting vote.

If a chairman wrongly refuses to put an amendment, and thereby withdraws a relevant and material question from the meeting, the original resolution, if passed, will be set aside. The person whose amendment has been wrongly rejected does not, by subsequently voting against the original resolution, Amendments.

(*d*) *Grant on Corp.* 65.

(*e*) See *Culder, &c., Nav. Co. v. Pilling*, 14 M. & W. 76; *Adley v. Whitstable Co.*, 17 Ves. 315, 19 ib. 304, and 1 Mer. 107.

(*f*) *National Dwellings Society v. Sykes* [1894], 1 Ch. 359.

(*g*) *Wall v. London and North.*

Assets Corp. [1898], 2 Ch. 469

(*h*) *Salisbury Gold Mining Co. v. Hathorn* [1897], A. C. 268.

(*i*) *Nell v. Longbottom* [1894], 1 Q. B. p. 771.

(*k*) *Bland v. Buchanan* [1901], 2 K. B. 75.

Bk. III. Chap. 1. lose his right to take proceedings to prevent the company from
Sect. 2. carrying it into effect (l).

Resolution of a
majority is a
resolution of a
meeting.

Where there is no special provision to the contrary, the resolution come to by the majority of those present at a meeting is the resolution of that meeting (m); and the chairman is the person to decide what the result is and all incidental questions requiring instant decision. His decision as to the result is not necessarily final (n); it may be made so by the regulations of the company (o), and in such cases the Court will not examine into the correctness of it unless it is impeached for fraud (p).

It is not illegal to transfer or procure shares before a meeting so as to multiply votes at it; nor can votes so obtained be disregarded (q).

A meeting at which there is not present a sufficient number of persons to transact business, cannot pass any valid resolution (r).

Interested votes.

It is conceived that an agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment (s). But as a matter of law as distinguished from conscience a person may vote on a question in which he happens to have a personal interest opposed to that of the company;

(l) *Henderson v. Bank of Australasia*, 45 Ch. D. 330. The amendment was not put in writing or formally tendered, but it was definitely moved, and this was sufficient.

(m) *Horbury Bridge Coal, &c., Co.*, 11 Ch. D. 109, deciding that the regular method of voting is by show of hands, and that an article giving every member one vote for every share only applies to cases where a poll is demanded. See, too, *Ernest v. Loma Gold Mines* [1897], 1 Ch. 1.

(n) *Indian Zoedone Co.*, 26 Ch. D. 70.

(o) E.g., under § 51 of the Companies Act, 1862.

(p) *Arnott v. United African Lands, Ltd.* [1901], 1 Ch. 518, approving *Hadleigh Castle Gold Mines Ltd.* [1900], 2 Ch. 419, and over-

ruling *Young v. South African, &c., Syndicate* [1896], 2 Ch. 268. *Wall v. London and Northern Assets Corp.* [1899], 1 Ch. 550; *Gold Company*, 11 Ch. D. 701. See, too, *R. v. Samuel* [1895], 1 Q. B. 815, when the return of a returning officer was held conclusive.

(q) *Pender v. Lushington*, 6 Ch. D. 70; *Stranton Iron and Steel Co.*, 16 Eq. 559; *Cannon v. Trask*, 20 Eq. 669; *Moffitt v. Farquhar*, 7 Ch. D. 591; and see *North-West Transportation Co. v. Beatty*, 12 App. Ca. 589, noticed *infra*.

(r) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Sharp v. Dawes*, 2 Q. B. D. 26.

(s) See *Elliot v. Richardson*, L. R. 5 C. P. 744, where the agreement was held illegal as opposed to

and where the question was whether proceedings should be taken by the company to impeach the title of some of the shareholders in it, those shareholders were held entitled to vote in respect of the very shares the title to which was disputed (*t*). So a director may vote as a shareholder on the question whether a contract between the company and himself shall be entered into or be confirmed (*u*). Bk. III. Chap. 1.
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Absent members are not entitled to vote by proxy unless they are specially empowered so to do (*x*). The right of an absent member to vote by proxy depends on the terms of the company's regulations, and these must be strictly complied with (*y*). A corporation entitled to hold shares in another company has the same right to vote by proxy as any other member (*z*). A member who signs a form of proxy in blank, and hands it over to another to be used in the ordinary way, impliedly authorises that other to fill up the blank with his own name (*a*). It would seem that a person who has himself a right to attend a meeting cannot be considered to represent another, for whom he holds a proxy, unless he shows some intention to act for his principal as well as for himself (*b*). In the absence of any special provision in the company's regulations, when no poll is demanded and the voting is by show of hands, no person present is entitled to more than one vote, however many proxies he may hold; a person present who is not a member, but is the holder of a proxy, is entitled to vote (*c*). Proxies.

the Companies Act, 1862. See, further, *Moffatt v. Farquharson*, 2 Bro. C. C. 338; *Card v. Hope*, 2 B. & Cr. 661. Compare *Bolton v. Madden*, L. R. 9 Q. B. 55, where an agreement between two subscribers to a charity to vote for each other's nominees was held not to be illegal.

(*t*) *East Pant Du Mining Co. v. Merryweather*, 2 Hem. & M. 254. See, also, *Menier v. Hooper's Telegraph Works*, 9 Ch. 350, and *Burland v. Earle*, Times, 11th Nov., 1901. Compare *Atwood v. Merryweather*, 5 Eq. 464, note, and see 8 & 9 Vict. c. 16, §§85 and 86, and the Companies Act, 1862, Table A., No. 57, as to

votes by directors on matters in which they are interested.

(*u*) *North-West Transportation Co. v. Beatty*, 12 App. Ca. 589, where the director had bought up shares to secure a majority. *Burland v. Earle*, Times, 11th Nov., 1901.

(*x*) See Grant on Corporations, 256, note (*g*); Com. Dig. Franchise, F. 11.

(*y*) *Harben v. Phillips*, 23 Ch. D. 14; *Indian Zoedone Co.*, 26 Ch. D. 70.

(*z*) *Indian Zoedone Co.*, 26 Ch. D. 70.

(*a*) *Ex parte Duce*, 13 Ch. D. 429; *Ex parte Lancaster*, 5 Ch. D. 911.

(*b*) *Ex parte Evans*, 13 Ch. D. 424.

(*c*) *Ernest v. Loma Gold Mines, Ltd.*

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Stamps.

Where voting by proxy is allowed, the appointment of the proxy to vote at any one meeting must bear a penny stamp (*d*); and the appointment, if it is to bear a penny stamp, must specify the day upon which the meeting, at which it is intended to be used, is to be held; but if the date of the meeting is accidentally left in blank the secretary may fill it up (*e*); and the proxy is available only at the meeting so specified, or an adjournment thereof (*f*). The penny stamp must be fixed before the execution of the proxy paper (*g*). Every person who makes or executes, or votes or attempts to vote by means of such a voting paper not duly stamped incurs a penalty of 50*l.*, and his vote is absolutely void (*h*). If the appointment authorises the proxy to vote at more than one meeting, or if the meeting is not specified, the proxy paper will require a ten-shilling instead of a penny stamp (*i*). A proxy paper which requires a ten-shilling stamp, if executed abroad, may be stamped at any time within thirty days after its arrival in this country (*k*), and may be acted upon before it is stamped (*l*). The expense of stamping proxy papers ought to be borne by those who want them and not by the company, unless there is some provision to that effect (*m*).

Husband and
wife voting.

The right of a married woman or of her husband to vote in respect of shares held by her has not been judicially considered. Speaking generally, however, and without reference to the regulations of any particular company, it would seem

[1897], 1 Ch. 1, affirming *ib.* [1896], 2 Ch. 572, and over-ruling *Bidwell Brothers* [1893], 1 Ch. 603. These were decisions under § 51 of the Companies Act, 1862, but the point that under that section the chairman's decision was conclusive (see *ante*, p. 428, note (*p*)) was not taken.

(*d*) 54 & 55 Vict. c. 39, §§ 1, 80, and Schedule.

(*e*) *Ernest v. Loma Gold Mines, Ltd.* [1897], 1 Ch. 1.

(*f*) 54 & 55 Vict. c. 39, § 80 (1).

(*g*) 54 & 55 Vict. c. 39, § 80 (2).

(*h*) 54 & 55 Vict. c. 39, § 80 (3).

(*i*) 54 & 55 Vict. c. 39, § 1, and Schedule. *English, Scottish, &c.*,

Bank [1893], 3 Ch. 385. As to stamps on proxies under the older stamp laws, see *R. v. Kelk*, 12 A. & E. 559; *Monmouthshire Canal Co. v. Kendall*, 4 B. & Al. 453; *Trinity House of Hull v. Beadle*, 13 Q. B. 175.

(*k*) 54 & 55 Vict. c. 39, § 15 (2) a.

(*l*) *English, Scottish, &c., Bank* [1893], 3 Ch. 385, where the forms of proxy were in Australia, but the particulars were, in accordance with an order of the Court, telegraphed to this country and counted at a meeting in London.

(*m*) *Studdert v. Grosvenor*, 33 Ch. D. 528.

that if the shares belong to her as part of her separate estate, her husband has no right to vote in respect of them, and her vote is valid notwithstanding his disapproval thereof. But if the shares do not form part of her separate estate, she alone cannot in point of law be a member in respect of them, and cannot therefore vote (*n*); nor is her husband entitled to vote in respect of such shares until he has become a member of the company in respect of them. Nor does it follow from the fact that he is subject to liabilities in respect of his wife's shares, that he is entitled to the privilege of voting in respect of them.

The right of a shareholder to demand a poll has not been decided; but the right would probably be held to exist unless the contrary could be shown (*o*). A proxy in the usual form, authorising the holder to vote on behalf of his principal, does not authorise him to demand a poll on his behalf (*p*). If the right to demand a poll is vested in shareholders who hold a certain number of shares, shares represented by proxies, which they hold, are not to be taken into account (*q*). The demand should be made immediately after the declaration of the show of hands (*r*), and the poll may be taken at once without adjourning the meeting (*s*).

Absentees cannot effectually urge their ignorance of what took place at meetings which they might have attended had they thought proper so to do: and they are bound by the resolutions come to at a duly convened meeting, provided such resolutions relate to matters upon which the meeting

(*n*) See *R. v. Harrald*, L. R. 7 Q. B. 361. a 10s. stamp, see 54 & 55 Vict. c. 39, § 1, and Schedule.

(*o*) See Grant on Corp. 203; *R. v. Wimbledon Local Board*, 8 Q. B. D. 459; *Campbell v. Maund*, 5 A. & E. 865. If no poll is taken when rightfully demanded the election is void: *R. v. Cooper*, L. R. 5 Q. B. 457. As to demanding a poll on a question of adjournment, see *Macdougall v. Gardiner*, 1 Ch. D. 13.

(*p*) *Haven Gold Mining Co.*, 20 Ch. D. 151, at p. 157. If it contains such an authority it requires

(*q*) *R. v. Government Stock Investment Co.*, 3 Q. B. D. 442.

(*r*) *R. v. Thomas*, 11 Q. B. D. 282.

(*s*) *Chillington Iron Co.*, 29 Ch. D. 159; *R. v. D'Oyly*, 12 Ad. & E. 139. Some dicta to the contrary in *Horbury Bridge Coal, &c., Co.*, 11 Ch. D. 109, must be considered as overruled. See also *British Flux Producers' Co.*, W. N. 1889, 7.

Bk. III. Chap. 1. was competent to decide (t). Moreover, shareholders who
 Sect. 2.

receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein if what is done might have been validly sanctioned by them if present; but not if what is done is altogether illegal, and beyond the power of even all the shareholders (u).

The limits of the power of a majority will be examined hereafter (see p. 434 *et seq.*).

Minutes of
 meetings.

Minutes of meetings, and the contents of books kept by the officers of a company, are not, as against third persons, evidence for the company, unless expressly made so by Act of Parliament (x). Partnership books are, as a rule, evidence against every partner, because every partner is entitled not only to see them, but, in conjunction with his co-partners, to determine what shall be inserted and what not; but this is not the case with shareholders of companies, and consequently unless there is some statutory enactment or agreement to the contrary, the books of a company are no more evidence against ordinary members of the company than they are as against strangers (x). The inconvenience resulting from this principle is obviated in modern Acts of Parliament by making certain things, *e.g.*, the registers of shareholders, and signed minutes of meetings, *prima facie* evidence as well against shareholders as against strangers.

Shareholders are not, as between themselves and their directors, supposed to know all that is in the company's books (y).

Signing minutes. With respect to minutes of meetings, it is usual for Acts of

(t) *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Turquand v. Marshall*, 4 Ch. 376; *Norwich Yarn Co.*, 22 Beav. 165.

(u) See *Phoenix Life Assur. Co.'s case*, 2 J. & H. 441; *Irvine v. Union Bank of Australia*, 2 App. Ca. 366. Compare *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Spackman v. Evans*, ib. 171; *Houldsworth v. Evans*, ib. 263; *Phosphate of Lime Co. v.*

Green, L. R. 7 C. P. 43.

(x) *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 866. Compare *Alderson v. Clay*, 1 Stark. 405, and *The Thetford case*, 12 Vin. Ab. 90, pl. 16; *Maguire's case*, 3 De G. & S. 31. See, also, the next note.

(y) See *Longworth's case*, 1 De G. F. & J. pp. 27 and 32. See, too, *per Turner, L.J.*, in *Stewart's case*, 1 Ch. 587.

Parliament to require that the minutes of every meeting shall be entered in a book, and be signed by the chairman of the meeting, and to declare that the minutes so entered and signed shall be admissible in evidence in courts of justice. Bk. III. Chap. 1.
Sect. 2.

In practice, the minutes of a meeting are commonly made up and entered by the secretary after the meeting is over, and the chairman signs such minutes at a subsequent period (generally the next meeting). It has been frequently urged that a resolution made at a meeting, the minutes of which were entered and signed after the meeting was over, could not, by such minutes, be proved to have been made. But this objection has always been overruled, even where the minutes of each meeting ought in strictness to have been signed at such meeting (z). But where a company brought an action for calls, and the evidence of the making of the calls consisted of minutes which were signed after the commencement of the action, it was held that such minutes were not admissible (a).

The minutes are not the only admissible evidence of what took place at the meeting (b), and entry in the minutes is not essential to the validity of a resolution (c).

The maxim *omnia præsuntur rite esse acta* is applicable to the proceedings at meetings; and if minutes of such proceedings are produced it will be assumed that the meeting was duly held and convened (d), and if they are not produced it will be presumed against the company, and in favour of all persons dealing *bonâ fide* with its directors, not only that every resolution proved to have been made was duly passed, but also that all such resolutions and steps were made and taken as were necessary to authorise subsequent acts proved to have Omnia præsuntur rite esse acta.

(z) *Miles v. Bough*, 3 Q. B. 845; *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448; *West London Rail. Co. v. Bernard*, 3 Q. B. 873; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 675; *Inglis v. Great Northern Rail. Co.*, 1 McQueen, 112. See, also, *Roney's case*, 4 De G. J. & Sm. 426, which shows that those who sign minutes are treated as admitting their truth.

And compare *Tothill's case*, 1 Ch. 85.

(a) *Cornwall Great Consolidated Mining Co. v. Bennett*, 5 H. & N. 423.

(b) *Miles v. Bough*, 3 Q. B. p. 872.

(c) *Knight's case*, 2 Ch. 321, and *Ex parte Kennedy*, 44 Ch. D. p. 483, and *infra*, p. 434, note (e).

(d) *Ex parte Badman*, 45 Ch. D. pp. 28, 29; Companies Act, 1862. § 67.

Bk. III. Chap. 1. been done (e). But this presumption will not be made in
 Sect. 2. favour of directors and against the shareholders; and a transaction with directors which is invalid if not assented to by the shareholders must, if relied on by the directors, be proved by them to have been brought to the attention of the shareholders, and to have received their sanction (f).

Stamp. A resolution of a meeting is not an agreement, and does not require an agreement stamp (g).

Inspection of books, &c., by shareholders. One of the most important rights of shareholders is to inspect the books and accounts of the company, and to have them examined and reported upon by competent persons. This subject will be alluded to more in detail hereafter (h).

It may, however, be observed generally, that a right to inspect includes a right to copy if the first is practically useless without the second (i), and if there is no provision for the supply of copies (ii). It also includes the right to inspect by a solicitor, or other agent, against whom the company has no reasonable grounds of objection (j). A shareholder who has a right to inspect need assign no reason for exercising such right, and cannot be refused inspection on the ground that he desires it in order to oppose the directors or other shareholders (k). At the same time, the Court will not assist a shareholder in obtaining inspection for an improper purpose; and the right must be exercised at reasonable times and in a reasonable manner (l).

SECTION III.—OF THE POWERS OF MAJORITIES.

Disputes between shareholders. In the event of a difference arising between shareholders, it becomes necessary to consider whether there is any method of

(e) See *Lane's case*, 1 De G. J. & Sm. 504; *Grady's case*, ib. 488; *Stanhope's case*, 1 Ch. 161; *Knight's case*, 2 Ch. 321.

(f) See *British Provident Assur. Soc. v. Norton*, 3 N. R. 147, V.-C. K.

(g) *Mills v. British Provident Assurance Society*, 1 Fos. & Fin. 607.

(h) *Infra*, c. 3, § 4.

(i) *Nelson v. Anglo-American, &c.*, Co. [1897], 1 Ch. 130; *Mutter v. East. & Midland Rail. Co.*, 38 Ch. D. 92.

(ii) *Balughat Gold Mining Co.* [1901], 2 K. B. 665, overruling *Boord v. African Consolidated, &c., Co.* [1898], 1 Ch. 597.

(j) *Beran v. Webb* [1901], 2 Ch. 59, reversing, ib. [1901], 1 Ch. 724; *Credit Co.*, 11 Ch. D. 256.

(k) See cases in note (i), and *Holland v. Dickson*, 37 Ch. D. 669.

(l) See the cases last cited, and *R. v. Governor of Bank of England* [1891], 1 Q. B. 785.

determining which of them is to give way to the other. It is not uncommonly supposed by the public, that the minority of the shareholders, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot override the minority except within certain limits.

As regards incorporated companies, one limit is set by the doctrines of *ultra vires* which have been already explained (*m*). That which the company cannot do, even with the consent of all the shareholders, it obviously cannot do at the bidding of any majority, however large; and any shareholder can obtain the aid of the Court to prevent an act which is *ultra vires*, even although resolved upon by all the other shareholders (*n*).

Every company incorporated by Act of Parliament, by charter, or by letters patent, or by registration, is governed by a law defining its objects and limiting its powers, and such law cannot be abrogated by any agreement between the members of the company however unanimous they may be (*o*). A registered company cannot alter the nature of its business as defined in its memorandum of association, except under the powers contained in the Companies Memorandum of Association Act, 1890 (*p*); nor can even all the members of a chartered company do what they like with its property, *e.g.*, divide it amongst themselves without accounting for its value to the company (*q*); nor can even all the members of a railway or other company incorporated by Act of Parliament apply the funds of the company to a purpose which is not authorised by the Act by which the company is governed (*r*).

On the other hand, it is to be observed, that a corporation acts by a majority: the will of the majority is the will of the corporation (*s*); and whatever it is competent for the corporation to do can be done by a majority of its members against

(*m*) *Ante*, p. 214.

(*n*) See *infra*, pp. 440 *et seq.*

(*o*) See *Ashbury Rail. Co. v. Riche*, L. R. 7 H. L. 653; *Att.-Gen. v. Great East. Rail. Co.*, 5 App. Ca. 473.

(*p*) *Ibid.*, and see *infra*, p. 457 *et seq.*

(*q*) *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

(*r*) See *Att.-Gen. v. Great East. Rail. Co.*, *ubi supra*; and the cases cited *infra*, pp. 440 *et seq.*

(*s*) Generally speaking the will of the members, whether unanimous or not, must be formally expressed at a meeting duly convened. See *George Newman & Co.* [1895], 1 Ch. 674.

Bk. III. Chap. 1.
Sect. 3.

Acts which are
ultra vires.

Powers of
majorities in
the cases of
corporations.

Bk. III. Chap. 1. the will of the minority, unless there is some express provision
 Sect. 3. to the contrary (t). It follows from this, that the power of a majority of the shareholders of a company incorporated by charter or Act of Parliament, is limited only by that charter or Act, unless the powers of the majority are specially restricted in some other way (u).

Unanimous
 resolutions.

But the doctrines of *ultra vires* have no application to acts resolved upon by all the members of an unincorporated and unprivileged company. Such a company, although formed for one purpose, may, if all the members consent, depart from that purpose to any extent they all may please (x). There may be great difficulty in obtaining the assent of all; and in practice it is often impossible to do so. It is seldom, if ever, practically possible to apply to companies the recognised rule applicable to partnerships, viz., the rule that partners who deliberately do not adhere to their partnership articles, are to be treated as having agreed to vary the articles in those respects in which the partners have not observed them (y). At the same time, if any members of a company, be they shareholders or directors, choose to ignore the company's regulations, and not to observe the provisions contained in them, those individuals cannot afterwards object to the validity of a course of conduct adopted or acquiesced in by themselves on the ground that it is not warranted by the regulations; but their adoption or acquiescence in no way affects the rights and obligations of the other shareholders, either *inter se* or as between them and the acquiescing parties. On this ground, the non-observance of prescribed formalities has over and over again been held to be of no consequence as between acquiescing shareholders, and yet to be fatal as between them and other non-assenting shareholders (z).

(t) See Grant on Corporations, pp. 68 *et seq.*; *Australian Aux. St. Clipper Co. v. Mounsey*, 4 K. & J. 733; *Ereter Rail. Co. v. Buller*, 5 Ra. Ca. 211. See also the statute 33 Hen. 8, c. 27.

(u) Even a special arrangement restricting powers expressly conferred by statute may be invalid. See *Walker v. London Tramways*

Co., 12 Ch. D. 705.

(x) See *Keene's Executors' case*, 3 De G. M. & G. 272.

(y) Partn., p. 409, and as to the difficulty of applying this rule to companies, see *Ex parte Sargent*, 17 Eq. 273; *Keene's Executors' case*, 3 De G. M. & G. 272.

(z) Compare, for example, *Keene's Executors' case*, 3 De G. M. & G.

Passing now to the consideration of what is to be done where questions arise as to which all the shareholders are not agreed, the first point to determine is, whether the Act, charter, or deed of settlement, or regulations by which the company is governed, do or do not contain any express provision applicable to the matter in question; for if they do, such provision ought to be obeyed (a). If they do not, then the nature of the question at issue must be examined; for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a company, and differences which relate to matters with which it was never intended that the company should concern itself.

With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the shareholders are equally divided, those who forbid a change must have their way: *in re communi potior est conditio prohibentis* (b). If, however, in a case of this description, unprovided for by previous agreement, the shareholders are unequally divided, the minority must give way to the majority (c). This doctrine has been held to apply where the majority wished to make a division of profits, without first paying an outstanding debt (d); where the majority wished to borrow money (e); where the majority resolved to assign all the joint property to trustees, upon trust for sale and distribution amongst the joint creditors (f); where the majority resolved on leasing part of the property of the company for a

Bk. III. Chap. 1.
Sect. 3.

How disputes
must be settled.

1. Disputes on
matters arising
in ordinary
course of
business.

Power of
majority in
such cases.

272; and *Struffon's Executors' case*, 1 De G. M. & G. 576. See also *Bush's case*, 6 Ch. 246, and L. R. 6 H. L. 37.

(a) The general obligation to observe the provisions of companies' deeds of settlement will be found well put in *Ex parte Brown*, 19 Beav. 97, and *Lawes's case*, 1 De G. M. & G. 421.

(b) But see as to the employment of a ship, *Abbott on Shipping*, p. 58, ed. 12; and as to completing contracts already entered into, *Butchart v. Dresser*, 4 De G. M. & G. 545.

(c) See *ante*, p. 435, and *Gregory v. Patchett*, 33 Beav. 595; *Const v. Harris*, T. & R. 518; *Robinson v. Thompson*, 1 Vern. 465.

(d) *Stevens v. The South Devon Rail. Co.*, 9 Ha. 326, and see *Gregory v. Patchett*, 33 Beav. 595.

(e) See *Bryon v. The Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123, affirming S. C. 4 Jur. N. S. 680; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

(f) *Lord v. Governor and Co. of Copper Miners*, 2 Ph. 740.

Bk. III. Chap. 1. temporary purpose (g) ; where the majority of the subscribers
Sect. 3. ————— to an abortive company resolved that the subscriptions should
be returned (h) ; and where the majority approved and adopted
accounts fairly laid before them (i).

Matters in-
cluded in ordi-
nary course of
business.

Moreover, the legitimate business of a company includes whatever is fairly incidental to those things which it is formed to do, and whatever may be necessary for carrying on its business in the way in which it is ordinarily carried on by other people (k). Hence, where the directors of a fire insurance company, the policies of which did not cover losses occasioned by explosions of gunpowder, resolved to pay claims made in consequence of losses so occasioned, and it was proved that other companies generally did the same thing, although not bound to do so, it was held that such payments could not be restrained (l). So a railway and ferry company may use its ferryboats for excursion trips when not wanted for the ferry (m). So railway companies may, as incidental to their powers as carriers, allow their weighing machines to be used for weighing coals carried over their line, and may make a reasonable charge for such use (n), and may, as incidental to their rights of ownership, lease arches under their lines or otherwise deal with their land in a manner not inconsistent with the purposes of their undertaking (o) ; so a company may apply its funds in defending

(g) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141. See, also, *Forrest v. Manchester and Sheffield Rail. Co.*, 30 Beav. 40, and on appeal, 4 De G. F. & J. 126. See, too, note (l), *infra*.

(h) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(i) *Kent v. Jackson*, 2 De G. M. & G. 49, and 14 Beav. 367; *Stupart v. Arrowsmith*, 3 Sm. & G. 176. See as to opening accounts already settled, *Morgan's case*, 1 Mac. & G. 235.

(k) *Att.-Gen. v. Great East. Rail. Co.*, 5 App. Ca. 473; *Att.-Gen. v. London County Council* [1901], 1 Ch. 781, and the cases in the next notes.

(l) *Taunton v. Royal Insur. Co.*, 2 Hem. & M. 135. See on this case,

and those cited in note (g), *Joint Stock Discount Company v. Brown*, 3 Eq. 139.

(m) *Forrest v. Manchester and Sheffield Rail. Co.*, 30 Beav. 40, and 4 De G. F. & J. 126; and see *Att.-Gen. v. Great East. Rail. Co.*, 5 App. Ca. 473, as to supplying rolling stock.

(n) *L. & N. W. Rail. Co. v. Price*, 11 Q. B. D. 485.

(o) *Foster v. L. C. & D. Rail. Co.* [1895], 1 Q. B. 711 (disapproving of *Norton v. L. & N. W. Rail. Co.*, 9 Ch. D. 623); *In re Gonty and Manchester, Sheffield, &c., Co.* [1896], 2 Q. B. 439. So too canal companies, see *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

an action for libel brought against the editor of a news-
 paper owned and published by the company (*p*); so a company
 which has power to invest its money on mortgage may do what
 is necessary to work out its rights as a mortgagee and what is
 essential for the maintenance of its security (*q*). So a company
 may form a reserve fund and invest the monies set apart to
 create it either in its own name or in the name of a trustee (*qq*).
 So directors of a trading company, when there has been a very
 good year, may be justified in giving gratuities to their servants
 out of monies which might be divided between the share-
 holders (*r*). So companies may provide for the payment of
 compensation to their directors for loss of office on a sale of the
 company's business (*s*), or pay them a bonus out of monies
 which might be divided between the shareholders (*t*), or grant
 pensions to the families of deceased officers (*u*). So trading
 companies may take apprentices (*x*).

In questions of the class now under consideration, the views
 of the majority may vary from time to time, and effect must,
 it is conceived, be given to them as they change (*y*). Changes in
wishes.

A very important rule respecting the powers and votes of
 majorities is, that a majority, to have any weight, must act
 and be constituted with perfect good faith; for every member
 has a right to be consulted, to express his own views, and to
 have those views considered by the other members. In the
 language of Lord Eldon, "that is the act of all which is
 the act of the majority, provided all are consulted, and the

(*p*) *Breay v. Royal British Nurses Assoc.* [1897], 2 Ch. 272. Compare cases *infra*, p. 443, note (*q*). As to libels on companies in the matter of their business, see *South Hetton Coal Co. v. North Eastern News Assoc.* [1894], 1 Q. B. 133.

(*q*) *Sheffield, &c., Building Soc. v. Aizlewood*, 44 Ch. D. 412. Compare *Small v. Smith*, 10 App. Cas. 119; *Royal Bank of India's case*, L. R. 4 Ch. 252.

(*qq*) *Burland v. Earle*, Times, 11th Nov., 1901.

(*r*) *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754, and see *George Newman & Co.* [1895], 1 Ch.

p. 686. This right ceases when the company has ceased to carry on business, *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654. Compare cases in next note, and *infra*, p. 443, note (*p*).

(*s*) *Southall v. British Mutual, &c., Soc.*, 6 Ch. 614; *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 365.

(*t*) *George Newman & Co.* [1895], 1 Ch. p. 686.

(*u*) *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

(*x*) *Burnley Equitable, &c., Industrial Soc. v. Casson* [1891], 1 Q. B. 75.

(*y*) See *Exeter Rail. Co. v. Buller*, 5 Ra. Ca. 211, and *Att.-Gen. v. Gould*, 28 Beav. 485.

All members
entitled to be
heard.

Bk. III. Chap. 1. majority are acting *bonâ fide*, meeting not for the purpose of
 Sect. 3. — negating what any one may have to offer, but for the purpose
 of negating what, when they are met together, they may after
 due consideration think proper to negative. For a majority
 of partners to say, 'We do not care what one partner may
 say; we, being the majority, will do what we please,' is, I
 apprehend, what a court of equity will not allow" (z).

Majorities at
 meetings.

Moreover, where powers are conferred on a majority present
 at a meeting of not less than a certain number of persons,
 unless such meeting be duly convened and the requisite
 number be present at the meeting the powers in question
 cannot be exercised; and although it may be true that the
 required number of persons was summoned, and that the
 absentees could not have turned the scale, this will not render
 valid the acts of the majority of those actually present, for that
 is not such a majority as was originally contemplated (a).

2. Disputes on
 matters involv-
 ing a change in
 the nature of
 the business.

Passing now to the second class of differences, viz., those
 which relate to matters with which the company was never
 intended to concern itself, it is to be observed that what is
ultra vires an incorporated company must be *ultra vires* the
 majority of the members of an unincorporated company formed
 for similar purposes and with similar powers, and it has been
 decided over and over again that no majority, however large,
 can lawfully engage the company in such matters against the
 will of even one dissentient shareholder. Each member is
 entitled to say to the others, "I became a member in a con-
 cern formed for a definite purpose, and upon terms which were
 agreed upon by all of us, and you have no right, without my
 consent, to engage me in any other concern, or to hold me to
 any other terms, or to get rid of me, if I decline to assent to a

One dissentient
 can forbid a
 change.

(z) *Const v. Harris*, Turn. & R.
 525, and see *ib.* 518, and *Blisset v.*
Janiel, 10 Ha. 493; *Great Western*
Rail. Co. v. Rushout, 5 De G. & Sm.
 310; *Wall v. London & Northern*
Assets Corp. [1898], 2 Ch. 469; and
 further as to agreements precluding
 impartial voting, *ante*, p. 428, and
 cases as to the powers of majorities
 of debenture holders, *ante*, pp. 329-
 330; with reference to an alteration
 of articles of association, *infra*,

p. 462; and reduction of capital,
infra, Bk. III., c. 3, § 1. 3, and
 decisions under the Joint Stock
 Companies Arrangement Act, 1876,
 Bk. IV., c. 1, § 11.

(a) See *London and Southern*
Counties Freehold Land Co., 31
 Ch. D. 223; *Howbeach Coal Co. v.*
Teague, 5 H. & N. 151; *Ex parte*
Morrison, De G. 539. See, too, the
 cases cited *ante*, pp. 422 *et seq.*

variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable (*b*). This principle, except so far as it may be excluded by Act of Parliament (*c*), is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just. No cases upon this subject can be referred to with greater advantage than *Natusch v. Irving* and *Const v. Harris*, both of which were decided by Lord Eldon (*d*).

Bk. III. Chap. 1.
Sect. 3.

In companies
as well as in
partnerships.

In *Natusch v. Irving* (*e*), a company was formed in the early part of the year 1824 for granting fire and life assurances. The plaintiff was one of the original subscribers. In the summer of 1824, the Act of 6 Geo. 1, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff objected to this extension of the business of the company, and he instituted a suit to restrain it and obtained an injunction.

Fire and Life
Insurance
Company turning
into a Marine
Insurance
Company.
Natusch v.
Irving.

In *Const v. Harris* (*f*), the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient member for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate

Const v. Harris.
Altering principle on which
profits should
be dealt with.

(*b*) *Att.-Gen. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*c*) *E.g.*, as to companies registered under the Companies Acts by the powers conferred upon them by the Companies Memorandum of Association Act, 1890, noticed *infra*, § 4 (3) of the present chapter.

(*d*) See, too, *Davies v. Hawkins*, 3 M. & S. 488; *Fennings v. Grenville*, 1 Taunt. 241; *Glassington v. Thwaites*, 1 Sim. & Stu. 131.

(*e*) *Gow on Partnership*, App. 398, ed. 3. The case is referred to at length in the earlier editions of this work, see 4th ed., vol. i., p. 601, and *Partnership*, 5th ed., p. 316. See, also, *The Phoenix Life Insur. Co.*, 2 J. & H. 441. Compare *Bath's case*, 8 Ch. D. 334, where the original deed of settlement authorised the addition of other businesses.

(*f*) *Turn. & R.* 496.

Bk. III. Chap. 1. judgment, Lord Eldon distinctly recognised the principle, that
 Sect. 3. — articles which had been agreed on to regulate the rights of the
 members of a company, cannot be altered without the consent
 of *all* the members (*g*).

Modern cases
 illustrative of
 these principles.

In modern cases the same principle has been constantly
 recognised and followed (*h*). Indeed it may be said never now
 to be disputed; the contest always turning on the question,
 whether the acts of the majority do or do not belong to the
 class under consideration, rather than to the question whether,
 if they do, the minority is or is not bound by them. With
 reference to the former question, it has been held not com-
 petent for a majority of shareholders in a company formed
 for the purpose of making a railway between two places, to
 make a railway between two other places (*i*); nor for the
 majority of the members of a fire and life insurance company
 to convert the company into a marine insurance company (*k*);
 nor for a majority of the members of a railway company to
 engage it in the business of coal sellers (*l*); nor for a majority
 of members of an industrial society to subscribe to a strike (*m*);
 nor for a majority of the members of any company to employ
 the property or funds of the company otherwise than as con-
 templated by themselves and the other members; *e.g.*, by
 dividing the capital amongst themselves (*n*), or even amongst

(*g*) See *Turn. & R.* 517, 523. The judgments in this and the preceding cases are well worthy of attentive perusal.

(*h*) See *Ex parte Morgun*, 1 Mac. & G. 225; *Davidson's case*, 4 K. & J. 638; *Smith v. Goldsworthy*, 4 Q. B. 430; *Davies v. Hawkins*, 3 M. & S. 488; *Auld v. Glasgow Working Men's Building Soc.*, 12 App. Ca. 197.

(*i*) *Bayshaw v. The Eastern Union Rail Co.*, 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51. See, too, *Att.-Gen. v. London County Council* [1901], 1 Ch. 781, where it was held that the County Council, as owners of tramways, had no power to run omnibuses in connection with their tramways.

(*k*) *Natusch v. Irving*, *ante*, p. 441;

Phoenix Life Insur. Co., 2 J. & H. 441. In *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662, the railway company had express power to become a canal company also.

(*l*) *Att.-Gen. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154. Compare *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473.

(*m*) *Warburton v. Huddersfield Industrial Society* [1892], 1 Q. B. 817. The rules of the society verbally authorised the application of its profits to "any lawful purpose," but these words were held to mean any lawful purpose *eiusdem generis* with the general purposes mentioned in the rules.

(*n*) *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350; *Griffith v. Paget*, 5 Ch. D. 894.

all the shareholders whether they approve or not (*o*) ; by making presents to the directors out of capital monies which are not divisible between the shareholders (*p*) ; by paying the costs of actions, &c., instituted by or against the directors as individuals, and not as trustees or agents of the company (*q*) ; by paying dividends or interest on shares or share warrants out of capital (*r*) ; by applying the funds of the company in defraying the expenses of an application to Parliament to alter the constitution or objects of the company (*s*) ; or in paying more for preliminary expenses than the company's special Act allowed (*t*) ; or in the purchase of shares of retiring shareholders (*u*) except by way of a reduction of capital under the Companies Acts, 1867 or 1877 (*x*) ; or in subscribing to a public institution as the Imperial Institute (*y*) ; or in stamping, and paying for, the return of proxy papers of any kind, or in

(*o*) *Holmes v. Newcastle, &c., Abattoir Co.*, 1 Ch. D. 682.

(*p*) *York and North Mid. Rail. v. Hudson*, 16 Beav. 485. See, too, *Rossmore v. Mowatt*, 15 Jur. 238, V.-C. K. B., and compare cases *ante*, p. 439.

(*q*) See *Studdert v. Grosvenor*, 33 Ch. D. 528 ; *Smith v. Duke of Manchester*, 24 Ch. D. 611 ; *Pickering v. Stephenson*, 14 Eq. 322 ; *Kernaghan v. Williams*, 6 Eq. 228. Compare *Breay v. Royal British Nurses Association* [1897], 2 Ch. 272, *ante*, p. 439, note (*p*).

(*r*) The cases on this subject will be found collected and discussed hereafter, *infra*, Bk. III., c. 3, § 3. If directors have received from a shareholder any part of the money due upon his shares beyond the amount actually called up, and have agreed to pay interest on the money so advanced, interest must be paid out of capital if there are no profits out of which to pay it. This is not a reduction of capital but spending capital in payment of a lawful debt, *Lock v. Queenslund Investment, &c., Co.* [1896], A. C.

461, affirming [1896], 1 Ch. 397, and *Dale v. Martin*, 11 L. R. Ir. 371 ; affirming 9 L. R. Ir. 498 ; decisions under the Companies Act, 1862, Table A, § 7.

(*s*) *Lyde v. Eastern Bengal Rail. Co.*, 36 Beav. 10 ; *Munt v. The Shrewsbury and Chester Rail. Co.*, 13 Beav. 1 ; *Simpson v. Denison*, 10 Ha. 51 ; *Vance v. The East Lancas. Rail. Co.*, 3 K. & J. 50, and the cases there cited.

(*t*) *Munn v. Edinburgh Northern Tram. Co.* [1893], A. C. 69 ; *Great North-Western Central Rail. Co. v. Charlebois* [1899], A. C. 114.

(*u*) *Trevor v. Whitworth*, 12 App. Ca. 409 ; *Hope v. International Financial Soc.*, 4 Ch. D. 327 ; *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422 ; *Gregory v. Patchett*, 33 Beav. 595.

(*x*) *British and American, &c., Corp. v. Couper* [1894], A. C. 399 ; *Dicido Pier Co.* [1891], 2 Ch. 354. As to reduction of capital, see *infra*, Bk. III., c. 3, § 1.

(*y*) *Tomkinson v. South East. Rail. Co.*, 35 Ch. D. 675.

Bk. III. Chap. 1.
Sect. 3.

Bk. III. Chap. 1. printing and sending out proxy papers in a form calculated to influence the votes of the shareholders (z).
Sect. 3.

Invalid bye-laws.

Upon the same principle bye-laws which are not warranted by the terms of the instrument which confers the power of making them, are altogether invalid (a); and a majority cannot, unless empowered so to do by the company's Act, charter, deed of settlement, or regulations, or by some statute, forfeit shares (b) or reduce the capital of the company (c), or issue preference shares (d).

Transfer of business.

A company incorporated by charter or special Act of Parliament cannot delegate its powers, and cannot therefore transfer its business even for a time to another company (e); nor can the majority of the shareholders of any company bind the minority by an agreement to transfer its property and business, unless such power is authorised by the constitution of the company (f), or by statute (g). Nor is it competent for the majority of one company to purchase the assets and liabilities of another without similar powers (h). Whence it follows that

Amalgamation.

(z) *Studdert v. Grosvenor*, 33 Ch. D. 528.

(a) *Culder, &c., Nav. Co. v. Pilling*, 14 M. & W. 76; *Adley v. Whitstaple Co.*, 17 Ves. 315; 19 ib. 304; 1 Mer. 107.

(b) *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46.

(c) *Smith v. Goldsworthy*, 4 Q. B. 430; *Hope v. International Financial Soc.*, 4 Ch. D. 327, and *ante*, p. 443, note (u).

(d) *Hutton v. Scarborough Cliff Co.*, 2 Dr. & Sm. 514 and 521; and on appeal, 4 De G. J. & Sm. 672; *Ashbury v. Watson*, 30 Ch. D. 376. Although, as will be seen hereafter (*infra*, Bk. III., c. 3, § 3), it has since been decided in *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361, that registered companies may issue preference shares, unless there is something in the memorandum of association clearly inconsistent with their issue, this is because such companies have a statutory right to alter their articles of association (see *infra*, p. 462), and the mode of dividing the

profits of the company between the members is a matter which the Companies Acts leave to be dealt with in the articles. It is, therefore, conceived that notwithstanding this last decision the general principles upon which the former cases were decided are correct, and prevent a majority in other companies from issuing preference shares.

(e) *Hattersley v. Shelburne*, 10 W. R. 881, and 31 L. J. Ch. 873; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & S. 562; *Beman v. Rufford*, 1 Sim. N. S. 550; *Salomons v. Laing*, 12 Beav. 377. Compare *Clay v. Rufford*, 5 De G. & S. 768.

(f) See *Ernest v. Nicholls*, 6 H. L. C. 401; *Era Assur. Co.*, 2 J. & H. 400, and 1 H. & M. 672; and other cases, *ante*, pp. 240 and 256.

(g) As to statutes which authorise amalgamation in certain classes of companies, see *ante*, p. 241.

(h) See last note but one.

two companies cannot amalgamate with each other, unless such a transaction is authorised by the constitutions of both companies, or unless the companies are unincorporated and all the shareholders in both consent to the amalgamation (*i*). And where there is power to amalgamate, that power must be strictly pursued, or at least there must be no substantial departure from it (*k*).

The right of a majority of shareholders to apply to the Legislature or the Crown for an Act of Parliament or charter for the purpose of changing the constitution of the company, has occasioned much discussion and no little difference of opinion. The right of every person to apply to Parliament or to the Crown on any subject he pleases is founded upon principles of constitutional law, which are paramount to all others; and although there is an instance in which a minority of a chartered society obtained an injunction, restraining the majority from surrendering the existing charter with a view to procure a new one materially differing from it (*l*), the authority of this case is questionable. The Court will, however, even at the instance of one dissentient shareholder, grant an injunction restraining the application of the funds of an incorporated company in defraying the expenses of obtaining an Act of Parliament altering the constitution of that company (*m*); but upon constitutional principles the Court declines to go further, and will not restrain shareholders in a company from applying at their own expense for an Act which, if passed, will affect the whole company and change its constitution; those shareholders who object to the application must oppose it in Parliament (*n*).

(*i*) See notes (*e*) and (*f*).

(*k*) *Clay v. Rufford*, 5 De G. & Sm. 768.

(*l*) *Ward v. Society of Attornies*, 1 Coll. 370.

(*m*) *Munt v. The Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lanc. Rail. Co.*, 3 K. & J. 50; and the cases there cited.

(*n*) See the last cited cases, and *Ware v. The Grand Junction Waterworks Co.*, 2 R. & M. 470; and as to

injunctions restraining applications to Parliament, *Steele v. The North Metropolitan Rail. Co.*, 2 Ch. 237; *Telford v. Metropolitan Board of Works*, 13 Eq. 574; *The Lancashire and Carlisle Rail. Co. v. The North-Western Rail. Co.*, 2 K. & J. 293; *Heathcote v. The North Staffordshire Rail. Co.*, 2 Mac. & G. 100. See, also, *Bill v. Sierra Nevada, &c., Co.*, 1 De G. F. & J. 177, in which an injunction to restrain an application to a foreign government was also refused.

Bk. III. Chap. 1.
Sect. 3.

Right of majority to apply for power to alter nature of company.

Ward v. Society of Attornies.

Such applications may be made, but not at the expense of the company.

Bk. III. Chap. 1. The extent to which the Companies Memorandum of
 Sect. 4. Association Act, 1890, enables a company registered under the
 Companies Act, 1862, or under the former Act of 1856, to vary
 or extend the objects for which it was formed will be examined
 in the last section of this chapter (pp. 459 *et seq.*).

Recapitulation. Recapitulating the results now arrived at, it appears—

1. That within the limits set by the original constitution of a company, the voice of a majority must prevail.
2. That it is not competent for any number of shareholders, less than all, to pass beyond those limits.
3. That it is competent for all to do so, unless they are bound together not only by agreement amongst themselves, but by some charter, letters patent, or Act of Parliament, which is inconsistent with what they all desire to do.

SECTION IV.—OF THE CONSTITUTION AND MANAGEMENT OF PARTICULAR COMPANIES.

Statutory enact- Having made these general observations on directors and
 ments affecting shareholders, it is proposed to examine the various statutory
 the constitution provisions now in force relating to their powers and duties in
 of companies. particular companies.

There are no statutory provisions which affect the constitution of the managing bodies, or the powers of the shareholders of companies governed by the Banking Act of 7 Geo. 4, c. 46; or by the Letters Patent Act of 7 Wm. 4 & 1 Vict. c. 78. But the enactments affecting the management of the affairs of cost-book mining companies, of companies governed by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, and of companies governed by the Companies Act, 1862, are numerous and important, and require special notice.

1. *Cost-book mining companies governed by the Stannaries Acts, 1869 and 1887 (o).*

Duties of The affairs of a cost-book mining company are conducted by
 pursuer. an agent called a pursuer, and by the Acts above mentioned the following duties are imposed upon him :—

(o) The Act of 1869, 32 & 33 panies registered under the Com-
 Vict. c. 19, does not extend to com- panies Acts unless such companies

1. To enter proper accounts in the cost-book of the company every four months (*p*). Bk. III. Chap. 1.
Sect. 4.

2. To call a meeting of the shareholders every sixteen weeks for the transaction of ordinary business, and to submit to the meeting his accounts (*q*).

A copy of the company's rules and regulations is to be filed at the office of the registrar of a county court in Cornwall, and to be open to the inspection of all applicants at reasonable times (*r*). These rules and regulations may within certain limits be altered or added to by the company by special resolutions passed in accordance with the terms of the Act of 1869. The company has no power to make rules or regulations inconsistent with that Act, nor to abrogate any special rules or regulations for the management of the company existing at the time when the Act was passed (24 June, 1869): nor to make any special rule enabling a company then existing to borrow money (*s*). Company's rules
and regulations.

There must be an ordinary meeting of the company once every sixteen weeks (*t*). Resolutions at a meeting are passed by the votes of a majority in value of the shareholders present in person or represented by proxy (*u*). A meeting with special notice has power to make calls and audit the accounts (*x*). Meetings and
votes.

are expressly mentioned or necessarily implied, § 3, while the Act of 1887, 50 & 51 Vict. c. 43, does apply to such companies (§ 2, interpretation of the word "company"). Moreover, while the Act of 1869 applies to all mines in the Stannaries, § 3, the Act of 1887 applies only to metalliferous mines and tin streaming works in that district, § 3.

(*p*) 32 & 33 Vict. c. 19, § 9, and 50 & 51 Vict. c. 43, § 23. Compare the two sections, and notice that by the latter Act a penalty is imposed for any omission or false entry, §§ 23 & 24. See, as to mine club funds, § 13 of the Act of 1887.

(*q*) 50 & 51 Vict. c. 43, § 25. A penalty is imposed for any breach of duty. The accounts are to be

printed and a copy sent to each shareholder, *ib.*, § 26. Formerly the purser had to make certain annual returns under § 32, but this section has been repealed by the Stannaries Court Abolition Act, 1896, 59 & 60 Vict. c. 45.

(*r*) 32 & 33 Vict. c. 19, § 9, and 59 & 60 Vict. c. 45, and the order of the Lord Chancellor under that Act dated 16th December, 1896, printed in the Appendix; *West Devon Great Consols Mine*, 27 Ch. D. 106. As to the right of inspection, see *ante*, p. 434.

(*s*) 32 & 33 Vict. c. 19, § 7.

(*t*) 50 & 51 Vict. c. 43, § 25.

(*u*) 32 & 33 Vict. c. 19, § 4; for meaning of special resolution, see *ib.* § 6.

(*x*) *Ib.* § 10.

2. *Companies governed by 8 & 9 Vict. c. 16.*

Bk. III. Chap. 1.
Sect. 4.

First, as to the managing body.

The Companies Clauses Consolidation Act contains several important provisions relating to the appointment, rotation, powers, and proceedings of directors of the companies to which the Act applies (*m*). The special Act of such a company is supposed to fix the number of its directors, and this number cannot be varied except within such limits as may be thereby allowed (*n*). A certain number of the directors are required to retire from office in rotation every year, so that all the directors may be changed every three years; the persons to retire are to be determined by the directors by ballot if they do not otherwise agree: but the persons to take their place are to be elected by the shareholders (*o*). The directors may be removed by the shareholders at a general meeting (*p*). Occasional vacancies are to be supplied by the directors themselves (*q*). In order that a person may be eligible as a director he must be a shareholder, and hold as many shares as may be required by the company's special Act (*r*). Moreover, it is expressly declared that no person holding an office or place of trust or profit under the company, or interested in any contract with the company, is capable of being a director (*s*); and that if any director accepts or holds any other office or place of trust or profit under the company, or is directly or indirectly concerned in any contract with the company, or participates in the profits of any work to be done for it, or ceases to be the holder of the prescribed number of shares, then his office shall become vacant, and he shall cease from voting or acting as a director (*t*). But an exception is made as regards a director whose only interest in a contract with the company arises from his having shares in another company

1. Directors
of companies
governed by
8 & 9 Vict.
c. 16.

(*m*) See 8 & 9 Vict. c. 16, §§ 81 to 100.

(*n*) *Ib.* §§ 81 & 82. See on the construction of such Acts, *Portal v. Emmens*, 1 C. P. D. 201 and 664, and cases there cited.

(*o*) 8 & 9 Vict. c. 16, §§ 88, 83, 84.

(*p*) § 91. *Ile of Wight Rail. Co.*

L.C.

v. Tahourdin, 25 Ch. D. 320.

(*q*) *Ib.* § 89.

(*r*) *Ib.* § 85. See *Portal v. Emmens*, 1 C. P. D. 221 and 664; *Kincaid's case*, 11 Eq. 192; *Forbes's case*, 19 Eq. 353.

(*s*) *Ib.* § 85.

(*t*) *Ib.* § 86.

Bk. III. Chap. 1. with which such contract is made (u). A person who is interested
Sect. 4. in a contract from which he has obtained a release subject to confirmation, remains interested therein until his release is confirmed, and the confirmation when obtained does not relate back to the conditional release so as to validate an act done in the interval, *e.g.*, the giving of a vote, which was invalid so long as the person doing the act was interested in the contract (x).

Contracts between directors and company.

Foster v. Oxford Railway Company.

These provisions do not, like the similar clauses of the repealed Act of 7 & 8 Vict. c. 110 (y), render void a contract made between a director and the company, unless such contract is confirmed by the shareholders; and it was held in *Foster v. The Oxford Railway Company* (z), that under the Act 8 & 9 Vict. c. 16, such a contract was not void at law. But it must not be forgotten that, although the Act does not expressly invalidate contracts of this description, there is a well-established equitable principle which precludes any person whose duty it is to take care of others, from binding them by any bargain entered into on their behalf with himself, unless all the circumstances relating to such bargain are fully and clearly explained to them (a).

Nature of disqualifying contract.

With respect to the nature of the contracts which disqualify a person interested in them from being a director, it has been

(u) 8 & 9 Vict. c. 16, § 87. Apart from this clause, a shareholder in a company interested in a contract is himself interested in it. See *City of London Electric, &c., Co. v. Mayor of London* [1901], 1 Ch. 603.

(x) *Gloucester Election Petition* [1901], 1 K. B. 683.

(y) See 7 & 8 Vict. c. 110, § 29. The following decisions upon that section may be usefully referred to. *Ernest v. Nicholls*, 6 H. L. C. 401; *Curteis v. Anchor Insur. Co.*, 2 H. & N. 537; *Poole v. National, &c., Assur. Society*, ib. 687; *Ex parte Stears*, Johns. 480; *Stears v. South Essex Gas Co.*, 9 C. B. N. S. 180. The assignment by persons who have entered into a valid contract with a company of their contract to persons who may not contract with the com-

pany is valid if there is no novation. See *City of London Electric, &c., Co. v. Mayor of London* [1901], 1 Ch. 602, which turned on a special Act. See as to the purchase of shares by directors, *Hodgkinson v. Nat. Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422; *Lane's case*, 1 De G. J. & S. 504; and as to loans, *Teversham v. Cameron's, &c., Rail. Co.*, 3 De G. & S. 296; *Murray's Executors' case*, 5 De G. M. & G. 746; *Baker's case*, 1 Dr. & Sm. 55; *Bluck v. Mallalue*, 27 Beav. 398; *British Prov. Ass. Society v. Norton*, 3 N. R. 147; *Paul and Bereaford's case*, 33 Beav. 204.

(z) 13 C. B. 200; and *Kaye v. Croydon Tram Co.* [1898], 1 Ch. p. 368.

(a) See *Aberdeen Rail. Co. v.*

held that they must be contracts made with the company in the prosecution of its undertaking ; and that there is nothing to prevent a banker of a company from being one of its directors (b).

To return to the Act. The directors have the management of the affairs of the company, with the exception of such as are required to be transacted by a general meeting (c). They are subject to the control of a general meeting specially convened for the purpose, but no resolution of any such meeting renders invalid what may have been done before the resolution passed (d). The directors are required to hold meetings at such times as they shall appoint, and they are empowered to adjourn such meetings as they may think proper (e). Any two directors may require a meeting of directors to be called (e). One-third of the whole number of directors constitutes a quorum, unless some other quorum is prescribed by the company's special Act (c). All questions at any meeting are determined by a majority of votes of the directors present, and, in case of an equality of votes, the chairman has a casting vote (e). A chairman is required to be elected, and the elected chairman continues in office for a year (f). A deputy-chairman may be elected, if the directors think fit, and vacancies in the office of chairman and deputy-chairman are to be filled up (g). In case of the absence at any meeting of the chairman and deputy-chairman, the directors present are to choose one of their number to be a chairman for that meeting (h).

The directors are authorised to delegate their powers to one or more committees (i). Members of committees must act in concert and not delegate their powers to one of their number (k).

Blaikie, 1 McQu. 461 ; *Flanagan v. G. W. Rail. Co.*, 7 Eq. 116 ; and *infra*, p. 517 *et seq.*
 (b) *Sheffield and Manchester Rail. Co. v. Woodcock*, 7 M. & W. 574. The cases referred to above, in note (y), may be usefully consulted on this head. See also *Lewis v. Carr*, 1 Ex. D. 484.
 (c) 8 & 9 Vict. c. 16, § 90. See as to this, § 91, and *infra*, p. 454.
 (d) *Ib.* § 90.
 (e) *Ib.* § 92. See *infra*, note (i).
 (f) *Ib.* § 93.
 (g) *Ib.*
 (h) *Ib.* § 94.
 (i) *Ib.* §§ 95 & 96. See *D'Arcy v. Tamar Rail. Co.*, L. R. 2 Ex. 158, noticed *ante*, p. 229.
 (k) *Cook v. Ward*, 2 C. P. D. 255.

Bk. III. Chap. 1.
Sect. 4.

Contracts by
directors.
Duty to keep
books, &c.

Acts of *de facto*
directors valid.

Indemnity of
directors.

Duty to take
security from
subordinate
officers.

2. Shareholders
in companies
governed by
8 & 9 Vict.
c. 16.

The mode in which contracts are to be made on behalf of the company has been already explained (*l*).

The directors are required to cause to be entered in proper books, notes or minutes of all appointments and contracts made by them, and of the orders and proceedings of all meetings of the company, and of the directors and their committees (*m*). All entries are to be signed by the chairman of the meeting at which they are made, and entries so signed are receivable in evidence without any preliminary proof (*n*).

The proceedings of *de facto* directors are not invalid, although it may afterwards be discovered that there was some defect in their appointment, or that they were disqualified (*o*).

The directors are not personally liable for what they may lawfully do on behalf of the company, and they are entitled to be indemnified by the company against all costs, charges, and expenses properly incurred by them in the exercise of the powers entrusted to them (*p*).

The directors are required to take security from every person entrusted with the custody or control of the monies of the company (*q*); and they are empowered to demand from every officer employed by the company on account of all monies received by him on behalf of the company and the delivery up of all receipts and vouchers, and payment of the balance which may appear to be owing from him on such account (*r*). A summary remedy is provided in case such a demand is not complied with (*s*), and also against any officer believed to be about to abscond without accounting (*t*).

Secondly, as to the shareholders.

Ordinary general meetings of the shareholders are to be held twice a year, viz., in February and August, unless the company's Act otherwise directs (*u*). Extraordinary general meetings may

(*l*) 8 & 9 Vict. c. 16, § 97; see *ante*, p. 275.

(*m*) *Ib.* § 98.

(*n*) *Ib.* See as to this, *Miles v. Bough*, 3 Q. B. 845, and other cases noticed, *ante*, pp. 432, 433.

(*o*) *Ib.* § 99. As to the effect of such a clause, see *ante*, p. 415.

(*p*) *Ib.* § 100.

(*q*) *Ib.* § 109. See *Evans v. Coventry*, 8 De G. M. & G. 835. Decree on appeal, clause 6, as to the effect of not observing such clauses.

(*r*) *Ib.* § 110.

(*s*) *Ib.* §§ 111 & 112.

(*t*) *Ib.* § 113.

(*u*) *Ib.* § 66.

at any time be convened by the directors (*x*) ; but provision is also made for convening such meetings at the instance of the shareholders (*y*). In order to constitute a meeting, there must be present, either personally or by proxy, the quorum prescribed by the special Act ; and where no quorum is prescribed, then shareholders holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every 500*l.* of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders holding not less than one-twentieth of the capital of the company, shall be the quorum (*z*). Every meeting is to be presided over by a chairman, viz., by the chairman of directors, or in his absence by the deputy-chairman, or in the absence of both, by a director chosen by the meeting, or in the absence of all the directors, by a shareholder similarly chosen (*a*).

Fourteen days' public notice, at least, of all meetings is to be given by advertisement (*b*) ; and every notice of an extraordinary meeting is to specify the purpose for which the meeting is called (*c*) ; and if any matters, except such as are authorised by the legislature to be done at an ordinary meeting, are to be transacted at such meeting, the notice convening that meeting must state what those matters are (*d*). The shareholders present at any meeting are to proceed with the business to transact which the meeting shall have been convened, and with no other business ; and no business is to be transacted at an adjourned meeting except that left unfinished at the first meeting (*e*).

No shareholder is entitled to vote, unless all the calls upon his shares have been paid (*f*) ; but with this qualification, and except where the company's special Act otherwise provides, every shareholder is entitled to one vote for every share he holds up to ten, and to one additional vote for every additional

(*x*) 8 & 9 Vict. c. 16, § 68.

(*y*) *Ib.* § 70.

(*z*) *Ib.* § 72. For some purposes a less quorum is sufficient, see § 72.

(*a*) *Ib.* § 73.

(*b*) *Ib.* § 71, and see § 138.

(*c*) *Ib.* And see *ante*, pp. 423

et seq.

(*d*) *Ib.* § 67, 71, 138.

(*e*) *Ib.* § 74, and see §§ 67 & 69.

(*f*) *Ib.* § 75.

Bk. III. Chap. 1. five shares up to one hundred, and to an additional vote for every ten shares beyond the first hundred (*g*). Voting by proxy is allowed, subject to certain regulations, easily complied with (*h*); and every proposition is determined by a majority of votes, the chairman having the casting vote in case of an equality (*i*). Where a share is registered in the names of more persons than one, he whose name stands first on the register is to be treated as the shareholder for all purposes of voting (*k*). Lunatic shareholders are entitled to vote by their committees, and infant shareholders by their guardians (*l*), and a corporation by any one of its members duly appointed as its proxy (*m*). In case of a dispute as to whether any resolution has been passed by the required majority, a poll may be demanded: but if no poll is demanded the decision of the chairman is final (*n*).

Election of officers.

The shareholders elect the directors (*o*), but occasional vacancies occurring among them may be filled up by the continuing directors (*p*). The shareholders also appoint the auditors, and determine the remuneration of the directors, auditors, treasurer, and secretary, the amount of money to be borrowed on mortgage, and the extent to which the company's capital may be augmented (*q*). Dividends, moreover, can only be declared at a general meeting of the shareholders (*r*).

Other powers of shareholders.

The shareholders can also, at a meeting specially convened for the purpose, make regulations for the conduct of the directors (*s*); or remove them (*t*). The power of making bye-

(*g*) 8 & 9 Vict. c. 16, § 75.

(*h*) *Ib.* §§ 76 & 77, amended as to proxies where a shareholder is a corporation by 51 & 52 Vict. c. 48, and 52 & 53 Vict. c. 37. See *ante*, p. 429.

(*i*) 8 & 9 Vict. c. 16, § 76.

(*k*) *Ib.* § 78.

(*l*) *Ib.* § 79. *Qu.*: if guardians would have any such right apart from the Act, see *Rudd v. James* [1896], 2 Ch. 554, a case under the Friendly Societies Acts.

(*m*) 51 & 52 Vict. c. 48, amended by 52 & 53 Vict. c. 37.

(*n*) *Ib.* § 80.

(*o*) *Ib.* §§ 83 & 91.

(*p*) *Ib.* § 89.

(*q*) *Ib.* § 91. See, too, as to auditors, §§ 101 & 104, and as to borrowing money, § 38 *et seq.* A company must pay its secretary for his services, although his remuneration may not have been fixed at a general meeting. *Bill v. Darentth, &c., Rail. Co.*, 1 H. & N. 305.

(*r*) 8 & 9 Vict. c. 16, § 91.

(*s*) *Ib.* § 90.

(*t*) *Ib.* § 91. *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320.

laws may be exercised by the directors, subject to the control of the shareholders (u). Bk. III. Chap. 1.
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The company's register of shareholders is to be authenticated by the seal of the company at the ordinary general meetings of shareholders (x). Sealing register.

Shares cannot be forfeited for non-payment of calls without the sanction of a general meeting of shareholders (y). Forfeiture of shares.

The shareholders have a right to inspect and take copies of (z)— Right to inspect books, &c.

1. The shareholders' address-book (a).
2. The register of mortgages and bonds (b).
3. The register of consolidated stock (c).
4. The register of debenture stock (d).
5. The company's books of account (e).
6. The company's special Act (f).

They have also a right to have copies of, or of any part of the shareholders' address-book, and the company's books of account, and special Act (g).

Copies of the company's special Act may always be seen by any person interested (h).

3. *Companies governed by the Companies Act, 1862.*

As to altering the memorandum and articles.

The constitution of a company formed under the Act of 1862 is determined by its memorandum of association and its articles, to copies of which the members are entitled (i). Both the memorandum and the articles bind the company and the Constitution of company formed under Act.

(u) 8 & 9 Vict. c. 16, §§ 90 & 124. (b) Ib. § 45.
The bye-laws must be under seal. (c) Ib. § 63. *Holland v. Dickson*,
A justice of the peace who is a 37 Ch. D. 669.
shareholder cannot convict for a (d) 26 & 27 Vict. c. 118, § 28.
breach of a bye-law. *R. v. Ham-* *Mutter v. Eastern Midlands Rail.*
mond, 3 N. R. 140. Co., 38 Ch. D. 92.

(x) Ib. § 9. (e) 8 & 9 Vict. c. 16, §§ 117 &
(y) Ib. §§ 31 & 32. See *infra*, 119.
Bk. III. c. 6, as to forfeiture of (f) Ib. § 161.
shares, (g) Ib. §§ 10, 119, 161.

(z) See as to this, *Mutter v. Eastern Midlands Rail. Co.*, 38 Ch. D. 92, be bought of the Queen's printers.
and *ante*, p. 434. (h) Ib. § 161. Printed copies can
(i) 25 & 26 Vict. c. 89, § 19.

(a) 8 & 9 Vict. c. 16, § 10.

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Sect. 4.

Nature of
contract implied
by memorandum
and articles of
association.

members as if each member had signed and sealed them, and had covenanted to observe their conditions, subject to the provisions of the Act (*k*). The exact nature of this covenant has given rise to considerable discussion, and is even now very difficult to define (*l*); but it is now settled that it is not equivalent to a contract between the company on the one part and the members on the other, on which either a member can sue the company or the company can sue a member (*m*). Nevertheless, the memorandum, or as is more frequently the case, the articles may express the terms upon which a person may become a member of, or accept some office or employment from, or otherwise contract with the company, and if acted upon, an agreement between him and the company on which either party may sue may be implied partly from the memorandum or articles, and partly from the conduct of the parties (*n*).

Memorandum of
association.
Objects of
company.

The memorandum of association defines the nature and objects of the company. The objects must be specified; it would not be sufficient merely to state that the object was to carry on any business which the company might think profitable (*o*). If the memorandum of association is expressed in unreasonably wide and general terms, the generality of the expressions will be controlled by what on the true construction of the documents appear to be the real objects or main purpose of the company (*p*).

Alteration of
memorandum as
to objects.

Until 1890 the objects of a registered company could not be altered or enlarged, but by the Companies (Memorandum

(*k*) 25 & 26 Vict. c. 89, §§ 11 & 16.

(*l*) *Welton v. Saffery* [1897], A. C. 299, p. 315; *Allen v. Gold Reefs of West Africa* [1900], 1 Ch. 657; *Baring Gould v. Sharpington Combined, &c., Syndicate* [1899], 2 Ch. 80, and cases in the next two notes.

(*m*) *Eley v. Positive Life Ass. Socy.*, 1 Ex. D. 88; *Browne v. La Trinidad*, 37 Ch. D. 1; *Pritchard's case*, 8 Ch. p. 960; and see also *Wheal Buller Consols*, 38 Ch. D. 43, and other cases of that class noticed *infra*, Bk. IV. c. 1, § 13. 6, and cases in last note.

(*n*) *Ex parte Beckwith* [1898], 1 Ch. 324; *Swabey v. Port Darwin, &c., Co.*, 1 Megone, 385; *Pritchard's case*, 8 Ch. p. 960; *Isaacs' case* [1892], 2 Ch. 158, and other cases of that class *infra*, Bk. IV. c. 1, § 13. 6.

(*o*) *Crown Bank*, 44 Ch. D. 634.

(*p*) See case in last note, *Amalgamated Syndicate* [1897], 2 Ch. 600, and *Warburton v. Huddersfield Industrial Society* [1892], 1 Q. B. 817. As to the construction of memorandum and articles, see *ante*, pp. 162, 163.

of Association) Act, 1890 (*q*), any company registered under the Companies Act, 1862 (*r*), or it seems under the repealed Act of 1856 (*s*), may alter the provisions of its memorandum of association within certain defined limits, viz., so far as may be required in order to enable it (1) to carry on its business more economically or more efficiently, or (2) to attain its main purpose by new or improved means, or (3) to enlarge or change the local area of its operations, or (4) to carry on other businesses which may conveniently or advantageously be combined with its business, or (5) to restrict or abandon any of its objects (*t*).

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Companies
(Memorandum of
Association) Act,
1890.

Limits of power
to alter
objects.

Any alteration of the memorandum of association under this Act must be carried out by special resolution confirmed by the Court which has jurisdiction to wind up the company (*u*). The confirmation of the Court is obtained on petition (*x*); in the High Court the petition should be presented to a judge of the Chancery Division (*y*), or to the judge to whom the winding-up business is assigned (*z*). Before such confirmation can be obtained the Court must be satisfied that sufficient notice, unless dispensed with, has been given to all holders of debenture or debenture stock of the company, and to any other persons whose interests will, in the opinion of the Court, be affected by the alteration, and that any creditor who in the opinion of the Court is entitled to object, and does object in manner directed by the Court, has either consented to the alteration, or has been paid, or has been secured to the satisfaction of the

Procedure under
the Act.

(*q*) 53 & 54 Vict. c. 62.

(*r*) See *North of England, &c., Assn.* [1900], 1 Ch. 481, a registered unlimited company without capital and without shares.

(*s*) *Copiapu Mining Co.*, W. N. 1899, p. 25; *Hong Kong and China Gas Co.*, W. N. 1898, p. 158; *Nitrophosphate, &c., Co.*, W. N. 1893, p. 141; and 25 & 26 Vict. c. 89, §§ 176 & 177; but see *contra*, *General Credit Co.*, W. N. 1891, p. 153.

(*t*) 53 & 54 Vict. c. 62, § 1 (*5*).

(*u*) As to special resolution, see Companies Act, 1862, § 51; as to the Court having this jurisdiction,

see *infra*, Bk. IV. c. 1, § 1. If the petition ought to be presented to a County Court but is presented to the High Court, the latter Court has jurisdiction to hear it; *Rugeley Gas Co.*, W. N. 1899, p. 127.

(*x*) As to title of the petition, see *Aluminium Co.*, W. N. 1894, p. 6, and the exhibits to the affidavit in support. See *Onnium Investment Co.* [1895], 2 Ch. 127.

(*y*) *Islington and General Electric Supply, Ltd.*, W. N. 1892, p. 81.

(*z*) *Mining Shares Investment Co.* [1893], 2 Ch. 661.

Bk. III. Chap. 1. Court (a). The Court may impose terms and conditions when confirming the alteration (b), and in exercising its discretion has regard to the interests of the members of the company as well as of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made for the purchase of the interests of dissentient members (c). When the alteration has been confirmed, an office copy of the order (d), and of the memorandum of association as altered, must be sent by the company to the registrar within fifteen days of the date of the order (e). The registrar is to register the documents (f) and give a certificate of such registration; the certificate is conclusive evidence that the requirements of the Act have been complied with (g).

Instances of alterations allowed.

Under the powers conferred by this Act orders have been made confirming alterations to confer upon a company the power to issue and give security for debentures and debenture stock (h), to enable a company to make and supply electricity and electrical appliances for purposes other than telephonic communication, to which its powers were originally restricted (i), to extend the local area of a company's operations by making it world-wide instead of being limited to a particular country (k), to enable companies formed for the purpose of investing their monies in a limited class of investments, to invest their monies in a wider class (l), to enable a marine insurance company to

(a) 53 & 54 Vict. c. 62, § 1 (2). Directions as to these matters are given in chambers, and the master certifies the result before the petition is heard.

(b) *Ib.* § 1 (3).

(c) *Ib.* § 1 (4). The company may not expend any of its capital in such purchase, *ib.*

(d) The order is not, as a general rule, advertised, *Lancaster Banking Co.*, W. N. 1897, p. 3, but an advertisement may be directed. *Copper Mines, &c., Co.*, *ib.* p. 20.

(e) If not so sent the company is liable to a penalty. *Ib.* § 2 (2). The time may be enlarged by the Court. *Reversionary Interest Society*, W. N. 1892, p. 60; *Brin's Oxygen Co.*,

W. N. 1899, p. 44.

(f) If not sent within the fifteen days they should be registered as soon as they are sent. *Criccieth Pier, &c., Co.*, W. N. 1891, p. 15.

(g) *Ib.* § 2 (1).

(h) *Reversionary Interest Society* [1892], 1 Ch. 615, and *Government Stock Investment Co.* (No. 2) [1892], 1 Ch. 597. In this latter case there were debenture stock holders, but they had no security.

(i) *Oriental Telephone Co.*, W. N. 1891, p. 153.

(k) *Indian Mechanical Gold Extracting Co.* [1891], 3 Ch. 538. The area was originally limited to India.

(l) *Foreign and Colonial Govt. Trust Co.* [1891], 2 Ch. 395,

extend its business to life, fire, and accident insurance connected with marine risks (*m*), to enable a boiler insurance company to insure against other risks (*n*), and to enable a company formed to own and work one steamship only to own and work any number (*o*). But alterations which merely amplify the description of objects clearly comprised in the original memorandum will not be allowed (*p*).

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When the proposed alteration in the company's objects will render its original name misleading, the Court will, as a condition of confirming the alteration, require the company to change its name in such manner as the Court approves (*q*). In one case the Court required the company to give its existing debenture stock holders, who had no security, a floating charge on the whole of its assets as a condition of sanctioning an alteration which enabled the company to issue and secure debentures and debenture stock (*r*). In other cases the Court has confirmed the proposed alterations in part only, by adding words to limit their extent (*s*).

Terms imposed.

If a limited company, which has obtained a licence from the Board of Trade under the Companies Act, 1867 (*t*), to dispense with the word "limited," wishes to change its memorandum of association, it ought, in the first instance, to submit the proposed alterations to the Board of Trade, and if the Board approves them as being consistent with the continuation of the licence, the Court will entertain a petition for their confirmation (*u*).

A registered company may also change its memorandum of

Other alterations
in memorandum
of association.

explaining *Govt. Stocks Investment Co.* (No. 1) [1891], 1 Ch. 649, and *Govt. Stocks Investment Co.* (No. 2) [1892], 1 Ch. 597.

(*m*) *Alliance Marine Insurance Co.* [1892], 1 Ch. 301.

(*n*) *National Boiler Insurance Co.* [1892], 1 Ch. 306.

(*o*) *Bernicia Steamship, Ltd.*, W.N. 1900, p. 24. There was no opposition, otherwise, *semble*, the order would not have been made.

(*p*) *Consett Iron Co., Ltd.* [1901], 1 Ch. 236, where, however, very

extensive alterations were subsequently sanctioned.

(*q*) This was required in cases cited in notes (*h*), (*i*), (*k*), (*l*), (*m*), and (*n*), *ante*.

(*r*) *Government Stock Investment Co.* (No. 2) [1892], 1 Ch. 597.

(*s*) 53 & 54 Vict. c. 62, s. 1 (*5*). *Fleetwood Estate Co.*, W. N. 1897, p. 20; *Spiers and Pond, Ltd.*, W. N. 1895, p. 135.

(*t*) 30 & 31 Vict. c. 131, § 23.

(*u*) *St. Hilda's Incorporated Co.-leye* [1901], 1 Ch. 556.

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association in certain other respects, viz., by increasing (*x*) or reducing its capital (*y*), by consolidating its capital into shares of larger amount and converting its paid-up shares into stock (*z*), by subdividing its shares (*a*) and reconverting stock into shares (*b*), by changing its name (*c*), by rendering the liability of its directors unlimited (*d*), and in certain cases by limiting its objects in order to avail itself of the Mortgage Debenture Act, 1865 (*e*).

Articles of
association.

The articles contain regulations for the management of the company's affairs, and may be altered from time to time by a special resolution of the members (*f*), notwithstanding any article to the contrary (*g*). But neither the articles themselves nor the power of altering them can alter the constitution of the company as defined by the memorandum of association (*h*), or give validity to any provision which is inconsistent with the Companies Acts, *e.g.*, the articles cannot authorise a limited company to pay dividends out of capital (*i*), to purchase its own shares (*k*), or otherwise to reduce its capital except as allowed by the Companies Acts (*l*), or to issue its shares at

(*x*) 25 & 26 Vict. c. 89, § 12, *infra*, Bk. III., c. 3, § 1.

(*y*) 30 & 31 Vict. c. 131, § 9 *et seq.*, and 40 & 41 Vict. c. 26. As to returning profits in reduction of paid-up capital, see 43 Vict. c. 19, §§ 3 & 6, and *infra*, Bk. III. c. 3, § 1; and as to declaring that a portion of the capital shall not be called up except in the event of a winding up, see 42 & 43 Vict. c. 76, § 5.

(*z*) 25 & 26 Vict. c. 89, § 12, and *infra*, Bk. III. c. 3, § 1.

(*a*) 30 & 31 Vict. c. 131, § 21, and *infra*, Bk. III. c. 3, § 1.

(*b*) 63 & 64 Vict. c. 48, § 29, and *infra*, Bk. III. c. 3, § 1.

(*c*) 25 & 26 Vict. c. 89, § 13; see *ante*, p. 152.

(*d*) 30 & 31 Vict. c. 131, § 8.

(*e*) 28 & 29 Vict. c. 78, § 3, amended by 33 & 34 Vict. c. 20; see *ante*, p. 346.

(*f*) 25 & 26 Vict. c. 89, §§ 50 & 51. As to the notices to be sent when

it is desired to act on the altered articles, see *infra*, p. 476.

(*g*) *Walker v. London Tramways Co.*, 12 Ch. D. 705; *Mulleson v. National Insurance Corp.* [1894], 1 Ch. 200.

(*h*) *Welton v. Saffery* [1897], A. C. 299; *Ashbury Rail. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Ashbury v. Watson*, 30 Ch. D. 376, and 28 Ch. D. 56, and *ante*, p. 215 *et seq.*

(*i*) *Guinness v. Land Corporation of Ireland*, 23 Ch. D. 349. See further, *infra*, Bk. III. c. 3, § 3.

(*k*) *Trevor v. Whitworth*, 12 App. Ca. 409, disapproving of the reasoning of the Court of Appeal in *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76. *Taylor v. Pilsen, &c., Light Co.*, 27 Ch. D. 270, must be considered as overruled on this point.

(*l*) *Hope v. International Financial Society*, 4 Ch. D. 327.

a discount (*m*) ; and articles purporting to deprive a company of its power to alter its articles (*n*), or a shareholder of his right to present a petition to wind up the company (*o*), or of the rights conferred on a dissentient shareholder by s. 161 of the Companies Act, 1862, in the event of a sale under that section (*p*), have been held invalid. On the other hand, the Companies Acts do not require the memorandum of association to state in what way the profits of the company are to be divided between the shareholders, nor do the Acts themselves contain any provision on this subject. Unless, therefore, there is something in the memorandum of association which is inconsistent with the issue of preference shares (*q*), the articles of association, either in their original form or by subsequent alteration, may authorise their issue (*r*).

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The only express limitation imposed by the Act of 1862 on a company's power to alter its articles by special resolution is that such power is subject to the provisions of the Act and to the conditions contained in the memorandum of association. The power, however, must be exercised *bonâ fide* for the benefit of the company as a whole, and not for the benefit of one class of shareholders at the expense of another, and the company cannot, under cover of an alteration of its articles, break its contracts (*s*).

Alteration of
articles.

(*m*) *Welton v. Saffery* [1897], A. C. 299; *Oregum Gold Mining Co. v. Roper* [1892], A. C. 125; *Hirsche v. Sims* [1894], A. C. 654; *Almada v. Tirito Co.*, 38 Ch. D. 415; *New Chile Gold Mining Co.*, ib. 475; *Addlestone Linoleum Co.*, 37 Ch. D. 191. *Plaskynaston Tube Co.*, 23 Ch. D. 543; and *Ince Hull Rolling Mills Co.*, ib. 545 note, are overruled.

(*n*) *Walker v. London Tramways Co.*, 12 Ch. D. 705; *Malleon v. National Insurance, &c., Corp.* [1894], 1 Ch. 200.

(*o*) *Peveril Gold Mines* [1898], 1 Ch. 122.

(*p*) *Payne v. Cork Company, Ltd.* [1900], 1 Ch. 308. See, too, *Baring*

Gould v. Sharpington, &c., Syndicate [1899], 2 Ch. 81. *Semble* any of the provisions referred to in notes (*i*) to (*o*) would have been invalid even if in the memorandum.

(*q*) As in *Ashbury v. Watson*, 30 Ch. D. 376.

(*r*) *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361; *British and American Trustee, &c., Corp. v. Couper* [1894], A. C. 399; *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; *South Durham Brewery Co.*, 31 Ch. D. 261. *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 521, is overruled. See, too, *Underwood v. London Music Hall, Ltd.* [1901], 2 Ch. 309, and *infra*, Bk. III. c. 3, § 3.

(*s*) *Allen v. Gold Rec's, &c., Ltd.*

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Alteration of
members' rights
by alteration of
articles.

When conferred
by articles only.

The extent to which a company can affect the rights of members by an alteration of its articles has given rise to some discussion, and is perhaps not yet definitely settled. It is, however, submitted that any rights which are incidental to membership and are conferred *only* by the articles may be altered by altering the articles, provided that the alteration is within the limits imposed by the statute, and is made *bonâ fide* for the benefit of the company as a whole and does not affect past transactions (*t*). Thus articles may be altered to give the company a lien on the shares of members indebted to it, and the lien can be enforced after the alteration in respect of a debt previously incurred (*u*); so, too, an alteration of the articles may authorise the issue of preference shares, if this is not inconsistent with the memorandum of association (*x*), or change the time at which the company's uncalled capital is liable to be called up (*y*). So, too, in the case of a building society whose rules were subject to alteration, a member who had given notice of withdrawal, and who by the rules as they then stood was entitled to be paid a certain sum in respect of his shares, was held to be deprived of his right to that sum by an alteration of the rules made after his notice of withdrawal had been given, but before payment and whilst he was still a member (*z*). As will be seen hereafter, the Court

[1900], 1 Ch. 656; explaining *James v. Buena Ventura, &c., Syndicate* [1896], 1 Ch. 456; and in the case of building societies, *Sixth West Kent, &c., Socy. v. Hills* [1899], 2 Ch. 61, and *Sixth West Kent, &c., Socy. v. Shove*, *ib.*, p. 64, note, and compare cases in note (*z*), *infra*. See, too, as to the exercise of powers by a majority generally, *ante*, p. 439; in the case of debenture holders, *ante*, p. 329; in cases of reduction of capital, *Barrow Haematite Steel Co.*, 39 Ch. D. 582, and [1900], 2 Ch. 846, affirmed *W. N.* 1901, p. 208, and *infra*, c. 3, § 1; and in arrangements under the Joint Stock Co. Arrangement Act, 1870, *infra*, Bk. IV. c. 1, § 11.

(*t*) As to special articles conferring other powers of changing the rights of members, see *Hemans v. Hotchkiss Ordnance Co.* [1899], 1 Ch. 115.

(*u*) *Allen v. Gold Reefs, &c., Ltd.* [1900], 1 Ch. 656. In this case the alteration in fact only affected one member, but the Court held it was made *bonâ fide* in the interests of the company.

(*x*) *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361; overruling *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 521, and *ante*, p. 461.

(*y*) *Malleson v. National Insurance* [1894], 1 Ch. 200. But not if reserved under 42 & 43 Vict. c. 76, § 5.

(*z*) *Pepe v. City and Suburban*,

has sanctioned other alterations in the rights of members on Bk. III. Chap. 1.
a reduction of capital (a). Sect. 4.

There may, however, be special circumstances by contract or otherwise which will prevent the company from insisting on the alteration of the articles as against some particular member or members (b).

If the rights which it is proposed to alter are not merely incidental to membership, and are not conferred only by the articles but are dependent wholly or in part on a contract outside the articles, of which the terms are to be found in the articles or by reference to them (c), the power to alter such rights by an alteration of the articles depends upon whether such alteration is or is not consistent with the real bargain between the parties, or in other words whether there was any express or implied agreement between them that a subsequent alteration of the articles should not affect the terms of the contract. But when considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an alteration of the articles; if there is no such agreement they can be so altered, provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form (d). Thus when a director has accepted office on the terms of the articles without any special bargain, it has been held that an alteration of the articles may enable the company to remove him at an earlier date than they could have done under the original articles (e),

&c., *Building Society* [1893], 2 Ch. 311, and *Botten v. City and Suburban, &c.*, *Building Society* [1895], 2 Ch. 441. See, too, *Strohmenyer v. Borough of Finsbury, &c.*, *Soc'y.* [1897], 2 Ch. 469, and cases in note (e).

(a) *Infra*, Bk. III. c. 3, § 1.

(b) See *Allen v. Gold Reefs, &c.*, *Ltd.* [1900], 1 Ch. 656. Vaughan Williams, L.J., dissented because he thought that the alteration of the plaintiff's rights was inconsistent with the contract between

him and the company under which he had taken his shares as fully paid up. See, too, *Barrow Haematite Steel Co.*, 30 Ch. D., pp. 593, 594.

(c) See *ante*, p. 456, and cases in note (u) on that page. A contract referring to articles may incorporate their terms although the articles are invalid, *Muirhead v. Forth, &c., Ins. Asso.* [1894], A. C. 72.

(d) See case in note (b).

(e) *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1.

Bk. III. Chap. 1. and may change his remuneration for the future, though it
Sect. 4. cannot deprive him of fees which he has already earned (*f*).

Constitution of
existing com-
panies registered
under the Act

The constitution of an existing company, registered but not formed under the Act of 1862, is determined by the Act of Parliament, letters patent, deed of settlement, or other instrument creating or regulating the company. This constitution, so far as it is fixed by Act of Parliament or letters patent, is only alterable by the legislature or the Crown, as the case may be (*g*); nor can the members change the constitution of the company in any of those matters which, had it been formed under the Act of 1862, would have been unalterable by its members (*h*). But those regulations which are contained in any Act of Parliament or letters patent, and which, if the company had been formed under the Act of 1862, might have been altered by its members, may be altered by a special resolution of the members of an existing company, after its registration under the Act (*i*).

The Companies Memorandum of Association Act, 1890 (*k*), allows any such company to substitute a memorandum and articles of association for its deed of settlement (*l*), and also to alter the provisions of its deed of settlement in the manner and to the extent already mentioned.

Power to change
from unlimited
to limited.

A company registered under the Act as an unlimited company may register as a limited company under the provisions of the Companies Act, 1879, and may at the same time by special resolution increase the nominal amount of its capital, but such increased capital cannot be called up except in the event of the company being wound up; it may also provide that a portion of its uncalled capital shall not be called up except in that event (*m*).

(*f*) *Swabey v. Port Darwin Mining Co.*, 1 Megone, 385.

(*g*) 25 & 26 Vict. c. 89, § 196, cl. 3 & 4. See, also, 30 & 31 Vict. c. 131, § 47.

(*h*) § 196, cl. 6.

(*i*) § 196, and see § 176, as to companies governed by Table B. of the Act of 1856.

(*k*) 53 & 54 Vict. c. 62, § 1. See

ante, p. 457 *et seq.*

(*l*) Deed of settlement includes any contract of copartnership or other instrument constituting or regulating the company not being an Act of Parliament, royal charter, or letters of patent. See § 3 (3) and *Reversionary Interest Society* [1892], 1 Ch. 615.

(*m*) 42 & 43 Vict. c. 76, §§ 4 & 5.

As to the management of their affairs.

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Apart from the provisions already referred to, which enable a company to change its constitution and alter its regulations, very little is to be found in the earlier Acts relating to the internal management of a company's affairs or to the powers of directors. The Companies Act, 1900, contains some important provisions for the better protection of shareholders in relation to these matters, some of which, viz., those which relate to the allotment of shares offered to the public (*n*), to the payment of commission on the issue of such shares (*o*), to the issue of prospectuses (*p*), to the commencement of business and the exercise of borrowing powers (*q*), and the registration of mortgages (*r*), have been already discussed. The Act also contains provisions relating to the appointment and qualification of directors (*s*), the holding of a "statutory" meeting (*t*), the calling of extraordinary meetings (*u*), and the appointment of auditors (*x*), and their rights and duties (*y*). But even now matters relating to the powers of directors and the internal management of a company's affairs are, for the most part, left to be provided for by each company as it may seem proper, and are accordingly dealt with, as regards companies limited by shares (*z*), in Table A.

Management of
companies
affairs.

The Companies
Act, 1900.

Before examining the provisions in the Acts and in Table A. respecting the managing bodies and members of companies it is to be noticed that for the greater protection of the members of companies the Act of 1862 contains some very important provisions, enabling not only the members (*a*), but also, on their application, the Board of Trade to appoint inspectors to examine into and report upon the affairs of all companies registered under the Act (*b*). A copy of the report

Examination of
companies affairs
by inspectors.

(*n*) 63 & 64 Vict. c. 48, §§ 4, 5, and 7, *ante*, pp. 39 *et seq.*

(*o*) § 8, *ante*, pp. 43, 44.

(*p*) §§ 9 & 10, and as to the alteration of contracts mentioned in a prospectus, § 11, *ante*, pp. 44 *et seq.*, and pp. 124 *et seq.*

(*q*) § 6, *ante*, pp. 209 and 230.

(*r*) §§ 14-18, *ante*, pp. 310 *et seq.*

(*s*) §§ 2 & 3 *infra*, pp. 466, 467.

(*t*) § 12 *infra*, pp. 467 and 433.

(*u*) § 13 *infra*, pp. 468 and 474.

(*x*) §§ 21 & 22 *infra*, pp. 469 and 474.

(*y*) § 23 *infra*, Bk. III. c. 3, § 4.

(*z*) As regards companies limited by guarantee and not having a capital divided into shares, see Companies Act, 1862, Schedule 2, Form B., printed in the Appendix.

(*a*) 25 & 26 Vict. c. 89, § 60.

(*b*) §§ 56 & 59.

Bk. III. Chap. 1. of the inspectors, sealed with the seal of the company, is also
 Sect. 4. made admissible in any legal proceeding as evidence of their
 opinion on any matter contained in their report (c).

Auditors. The Act of 1900 also empowers the Board of Trade, on the
 application of any member of the company, to appoint an auditor
 if no auditors are appointed at the annual general meeting (d).

Matters to be provided for by articles. If a company intends to offer its shares to the public and
 wishes to go to allotment before the whole of such shares have
 been subscribed, it must fix a minimum subscription by its
 memorandum or articles of association (e). If the company
 wishes to have power when offering its shares to the public
 for subscription to pay a commission to persons subscribing
 for or underwriting its shares, the payment and the amount
 or rate per cent. of the commission must be authorised by
 the articles and stated in the prospectus (f). If the original
 articles do not provide for these matters they may be altered
 so as to do so.

Passing now to the provisions of the Acts and of Table A. the
 following rules will be found respecting the managing bodies and
 members of companies to which those Acts and that Table apply.

First, as to the managing body.

a.) Provisions of the Acts.

Provisions as to directors appointed by the articles of association. No person can be appointed by the articles of association to
 be a director (g) of any company, which is registered after 31st
 December, 1900, and invites the public to subscribe for its
 shares, unless before the registration of the articles he has
 signed and filed with the registrar of joint stock companies a
 consent in writing to act as a director (gg), and if the company's
 regulations require him to hold a specified share qualifica-
 tion (h), either signed the memorandum of association for at

(c) 25 & 26 Vict. c. 89, § 61.

(d) 63 & 64 Vict. c. 48, § 21(2). His
 remuneration is fixed by the Board
 of Trade but paid by the company.

(e) Companies Act, 1900, § 4, and
ante, p. 41.

(f) *Ib.* § 8, and *ante*, p. 43. This,
 however, does not apply to ordinary
 brokerage charges.

(g) Any person occupying the

position of a director is included in
 the term "director" when used in the
 Act of 1900, by whatever name he is
 called. 63 & 64 Vict. c. 48, § 30.

(gg) For form of consent, see the
 Order of the Board of Trade, 28
 December, 1900, Form No. 42.

(h) The Act does not require the
 director to hold any qualification
 shares.

least the number of shares necessary to qualify him, or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (*i*). Similar provisions apply to any person named as a director in any prospectus issued by the company before the expiration of a year from the time when it is entitled to commence business (*j*). Bk. III. Chap. 1.
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Whenever the regulations of the company require a director to hold a specified share qualification he must, unless already qualified, obtain his qualification within two months after his appointment, or such *shorter* time as may be fixed by the company's regulations (*k*). If he does not obtain his qualification within that time, or if he subsequently ceases to hold his qualification, his office is vacated, and he may not be reappointed until he has obtained his qualification (*l*). If after the expiration of such time he acts without having obtained his qualification he is liable to pay the company a penalty of £5 a day (*m*), but it is apprehended that, subject to any special provisions in the company's regulations, he will not, by having acted as a director, become liable to take and pay for his qualification shares (*n*). Duty to acquire
qualification
(if any).

Vacation of
office if
disqualified.

Penalty.

The Act of 1900 (*o*) requires every company limited by shares and registered after the 31st December, 1900, to hold a general meeting of its members, called the statutory meeting, not less than one month, and not more than three months after it is entitled to commence business (*p*). Seven days before the meeting is to be held the directors are to forward to every member a report containing certain particulars relating to the shares allotted, the consideration given for them, and the cash received in respect of them, an abstract of the receipts and payments of the company on capital account, an estimate, or account of preliminary expenses, the names Duties in con-
nection with
statutory
meeting.

(*i*) § 2.

(*j*) § 2. The prospectus must be signed by the directors named in it or their agent, and filed with the registrar. See § 9.

(*k*) § 3 (1).

(*l*) § 8 (2).

(*m*) § 3 (3).

(*n*) See *ante*, p. 416, and the cases on this subject *infra*, Bk. IV. c. 1, § 13, 6.

(*o*) § 12. Although this section is restricted to companies limited by shares, the corresponding provision in the Act of 1867 (30 & 31 Vict. c. 131, § 39), which applied to all companies governed by the Act, is repealed by § 33.

(*p*) See § 6. If there is no invitation to the public to subscribe for shares a company may commence business at once.

Bk. III. Chap. 1. and addresses of the officers of the company, and the particulars
 Sect. 4.

of any contract the modification of which is to be submitted to the meeting for approval with the particulars of the proposed modification (*q*). The whole report is to be certified by at least two directors, or if there are not two directors, by the sole director and manager (*r*), and certain particulars are to be certified as correct by the auditors, if there are any (*s*). It is the duty of the directors to file a copy of this report, duly certified, with the registrar (*t*); they must also produce at the commencement of the meeting a list of all the members of the company, with their names, addresses, and descriptions, and the number of shares held by them, and allow it to remain open and accessible to any member during the meeting (*u*).

Extraordinary meetings.

The Act of 1900 further imposes upon the directors of every registered company, whether registered before or after the commencement of the Act (*x*), and notwithstanding anything in the company's regulations, the obligation to convene an extraordinary general meeting on a requisition signed by the holders of not less than one-tenth of the issued capital on which all calls or other sums due have been paid (*y*). If a resolution which needs confirmation is passed at an extraordinary general meeting, the directors must forthwith convene a further extraordinary general meeting for the purpose of considering, and if thought fit confirming, the resolution (*z*).

Minutes of meetings and validity of irregular acts, &c.

The Act of 1862 renders the keeping of proper minutes of meetings, both of directors and shareholders, compulsory, and enacts that, until the contrary is proved, meetings and proceedings, of which minutes shall be properly made, shall be considered as duly convened and transacted, and that all appointments of directors, managers, or liquidators, shall be deemed valid, and that all their acts shall be valid,

(*q*) § 12 (2). For the Form of the Report, see the Order of the Board of Trade, 28 Dec., 1900, Form No. 46.

(*r*) § 12 (2).

(*s*) § 12 (3).

(*t*) § 12 (4).

(*u*) § 12 (5). See further as to this meeting *infra*, p. 473.

(*x*) §§ 13 and 31. Table A. has

provisions on this subject (Art. Nos. 32-34).

(*y*) As to the form of the requisition, see § 13 (2). The meeting must be summoned by the directors acting as a board, *State of Wyoming Syndicate* [1901], 2 Ch. 431.

(*z*) § 13 (4), and see *infra*, p. 474.

notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (a). Bk. III. Chap. 1.
Sect. 4.

The Act of 1900 contains provisions for the appointment of auditors by the members of the company (b). The directors may, however, appoint the first auditors of a company before the statutory meeting (c), and may fill any casual vacancy amongst the auditors (d), and fix the remuneration of any auditor appointed by them (e). The directors and officers of the company must give the auditors all such information and explanations as may be necessary for the performance of their duties, and the auditor's report must be read before the company in general meeting (f). No director or officer of the company can be appointed auditor (g).

In addition to these provisions the directors are bound by the Acts, and mostly under penalties, to do various things which it may be useful here to recapitulate, viz. :—

1. To keep a proper register of members (h), and to allow it to be inspected (i).

2. To make out and send to the registrar of joint-stock companies the annual lists required to be sent to him (k).

3. To file with the registrar proper returns on every allotment of shares in a limited company, and if any shares are allotted for a consideration other than cash, the requisite contracts (l).

4. To notify to the registrar all increases or re-distributions of capital and conversions of capital into stock (m), and all increases of members where there is no share capital (n).

(a) 25 & 26 Vict. c. 89, § 67. See *ante*, pp. 415 and 432.

(b) 63 & 64 Vict. c. 48, § 21. See further *infra*, p. 474, and c. 3, § 4.

(c) § 21 (4). Such auditor, unless previously removed by the shareholders, will hold office until the first annual general meeting.

(d) § 21 (5).

(e) § 22.

(f) § 23.

(g) § 22 (3). The Companies Act, 1879, contains somewhat similar provisions in the case of banking companies registered with limited liability after the commencement of that Act. See 42 & 43 Vict. c. 76,

§§ 7–9, but under that Act the secretary or manager and the directors are required to sign the balance sheet. See § 8.

(h) 25 & 26 Vict. c. 89, § 25. See *ante*, p. 165.

(i) § 32. See *ante*, p. 172.

(k) §§ 26, 27, 45 & 46, and 63 & 64 Vict. c. 48, §§ 19 & 20. See *ante*, p. 173.

(l) 63 & 64 Vict. c. 48, § 7. See *ante*, p. 43, and addenda to that page.

(m) 25 & 26 Vict. c. 89, §§ 28–34. The Act of 1900, which allows stock to be reconverted into shares, does not contain any such provision, see § 29 of that Act.

(n) 25 & 26 Vict. c. 89, § 34.

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5. To keep a register of directors, and send a copy of it to the registrar, and notify to him all changes amongst the directors (*o*).

6. To take care, in the case of limited companies, that the word "limited" appears, and is used as prescribed by the statute (*p*).

7. To keep, in the case of a limited company, a register of all mortgages or charges specifically affecting its property, and allow such register to be inspected by creditors or members (*q*); and, in the case of all registered companies, to file with the registrar all mortgages or charges of the kind specified in the Companies Act, 1900, § 14, and created by the company on or after the 1st January, 1901, and to keep copies thereof at the registered office of the company, and to allow such copies to be inspected by members or creditors (*qq*).

8. To keep, in the office of a limited banking company, an insurance company and deposit provident or benefit society, the statement required by the Act, and to permit such statement to be inspected (*r*).

9. To take care that the company does not carry on business with less than seven members (*s*).

10. To send copies of all special resolutions to the registrar, and to the members if required (*t*).

11. To submit to examination by the inspectors appointed by the Board of Trade (*u*), or by a special resolution of the members (*x*).

The powers of directors, as regards calls, dividends, and the forfeiture of shares, and their duties and liabilities on the winding up of a company, will be pointed out hereafter.

b.) Provisions of Table A.

Directors.
Table A.

The business of the company is to be managed by the directors, and, in case of any vacancy in their body, by those

(*o*) §§ 45 & 46, amended by 63 & 64 Vict. c. 48, § 20.

(*p*) 25 & 26 Vict. c. 89, §§ 41 & 42. See *ante*, p. 349, note (*k*). The Board of Trade may dispense with this in the case of companies formed for purposes not of gain, 30 & 31 Vict. c. 131, § 23.

(*q*) 25 & 26 Vict. c. 89, § 43, and *ante*, pp. 311 and 314. See, also, as to the registration, &c., of deben-

tures issued under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78, §§ 6-11, 21, 23, 27, 31-33, and 33 & 34 Vict. c. 20, §§ 3 *et seq.*

(*qq*) 63 & 64 Vict. c. 48, §§ 14 and 18, and *ante*, pp. 312 *et seq.*

(*r*) 25 & 26 Vict. c. 89, § 44.

(*s*) § 48.

(*t*) §§ 53 & 54.

(*u*) § 58.

(*x*) § 60.

who continue in office (Table A., Nos. 55 and 56). The powers of the directors are, however, subject not only to the provisions of the Act, but also to the company's regulations (ib.), which, as before observed, may be altered by special resolution. What is done by *de facto* directors is valid, notwithstanding the subsequent discovery of a defect in their appointment or of their disqualification (No. 71, and § 67 of the Act of 1862 (y)).

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The directors are the proper persons to make calls (No. 4); and forfeit shares (Nos. 17 and 22) (yy). But the directors cannot, without the sanction of the members, convert shares into stock (No. 23), increase the capital by issuing new shares (No. 26), or declare dividends (No. 72).

Until directors are appointed the subscribers of the memorandum of association are deemed to be the directors (Table A., No. 53) (z), and are the persons to determine the number and names of the first directors (No. 52) (a). This number may afterwards be varied by the members (No. 63). At the first ordinary meeting of the members, after the registration of the company, the whole, and in every subsequent year one-third, of the directors must retire (No. 58). In case of any dispute as to who shall retire in the first two years after the first, the persons to retire must be determined by ballot (No. 59); but afterwards those who have been longest in office must retire (No. 59). A retiring director may be re-elected (No. 60). Vacancies occurring by retirement under these provisions must be filled up by the members at the meeting at which the directors retire (No. 61); otherwise the meeting stands adjourned for a week (No. 62); and if the vacancies are not filled up at

Appointment of
directors.

(y) See *ante*, p. 415, and *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, where the defect in the appointment of directors was held not to be cured by a clause of this nature. Compare *Murray v. Bush*, L. R. 6 H. L. 37, which turned on a similar clause in 7 & 8 Vict. c. 110, § 30.

(yy) Article 84, as to the appointment of the first auditors, is now superseded by the Companies Act, 1900, § 21 (4), see *ante*, p. 469.

(z) They are not directors for all

purposes, e.g., Art. No. 58 does not apply to them. *John Morley Bldg. Co. v. Barras* [1891], 2 Ch. 386, and *ante*, p. 414.

(a) If all are unanimous they need not meet for this purpose, *Ex parte Kennedy*, 44 Ch. D. 472, otherwise there must be a meeting at which a majority are present, *London & Southern Counties Land Co.*, 31 Ch. D. 223; *John Morley Bldg. Co. v. Barras* [1891], 2 Ch. 386.

Bk. III. Chap. 1. such adjourned meeting, those directors whose places are not
 Sect. 4. filled up continue in office for another year (No. 62). Casual vacancies may be filled up by the other directors (No. 64) (*b*).

Disqualifications. A director vacates his office—1. if he holds any other office or place of profit under the company (*c*); 2. if he becomes bankrupt or insolvent (*d*); 3. if he (otherwise than as a member of some other company (*e*)) is concerned in or participates in the profits of any contract with the company (No. 57) (*f*). A person interested in a contract from which he has obtained a release subject to confirmation remains interested until the release is absolute; the confirmation of the release does not relate back so as to validate a vote given in the meantime (*g*).

Removal of directors.

Irrespectively of these provisions, any director may be removed by a special resolution of the members (No. 65).

Their pay.

The members fix the remuneration of the directors (No. 54).

Meetings of directors.

The directors may regulate their own meetings as they think fit (No. 66) (*h*), but they are bound to keep minutes of their proceedings (see § 67 of the Act of 1862). The directors may determine what number is to be a quorum (Table A., No. 66), and may elect a chairman and determine the period for which he shall hold office (No. 67). If no chairman is present when a meeting assembles, the directors present must choose one of themselves to be chairman *pro tem.* (No. 67).

Questions arising at any meeting of directors are to be

(*b*) *York Tramways Co. v. Wil-
 lows*, 8 Q. B. D. 685; *Munster v.
 Cammell*, 21 Ch. D. 183.

(*c*) The directors may appoint one of themselves to be a manager at a salary, but the person so appointed ceases by the appointment to be a director. *Eales v. Cumberland Black Lead Co.*, 6 H. & N. 481. Compare *Iron Ship Coating Co. v. Blunt*, L.R. 3 C. P. 484. The office of trustee for debenture holders, if paid, is an office within the article. *Astley v. New Tivoli, Ltd.* [1899], 1 Ch. 151. If the articles require a share qualification see the Act of 1900, § 3, *ante*, p. 467.

(*d*) Such an article does not prevent an undischarged bankrupt

from being appointed a director. *Dawson v. African, &c., Trading Co.* [1898], 1 Ch. 6.

(*e*) That a shareholder of a company interested in the contract is himself interested, see *City of London Electric, &c., Co. v. Mayor of London* [1901], 1 Ch. 602.

(*f*) See as to this, *ante*, pp. 449, 450, and *Costa Rica Rail. Co., Ltd. v. Forwood* [1901], 1 Ch. 747, affirming [1900], 1 Ch. 756, and *infra*, chap. 2, § 2.

(*g*) *Gloucester Municipal Election Petition* [1901], 1 Q. B. 683.

(*h*) *E.g.*, they may take the business in what order they choose. *Cowley & Co.*, 42 Ch. D. 209.

determined by a majority of votes, the chairman having a second or casting vote in case of equality (No. 66). Bk. III. Chap. 1.
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Any director may at any time summon a meeting of directors (No. 66) (*i*).

The directors may delegate any of their powers to committees of themselves (Nos. 68—70) (*k*). Delegation of
powers.

The directors may at any time convene an extraordinary general meeting of the members (No. 32).

The directors are bound to keep accounts of the company's stock in trade, receipts and expenditure, assets and liabilities; and the members are entitled to inspect these accounts, subject to such restrictions as the members may themselves impose (No. 78). The directors are further bound, once a year at least, to lay before the members a statement of the company's income and expenditure for the past year (Nos. 79 and 80), and also a balance sheet containing a summary of the assets and liabilities of the company in the form given at the end of Table A. (No. 81). A printed copy of this balance sheet is moreover to be sent to each member seven days before the meeting (No. 82). Duties of
directors.

Secondly, as to the members.

a.) Provisions of the Acts.

The question who are members has been already examined (*l*). The original number of members may be increased (*m*). Members.

The Act of 1900 requires that every company limited by shares and registered after the 31st December, 1900, shall hold a general meeting of its members, called the statutory meeting, not less than one and not more than three months after it is entitled to commence business (*n*). The members present are entitled to discuss any matter connected with the formation of the company or arising out of the report which the directors are required to send them beforehand, but no resolution may be passed unless due notice of it has been given in accordance with the company's articles of association (*o*). The company Meetings.
Statutory.

(*i*) The notice need not state the business to be transacted. *La Compagnie de Mayville v. Whitley* [1896], 1 Ch. 788.

(*k*) See *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674, and

ante, p. 206.

(*l*) *Ante*, pp. 163 *et seq.*

(*m*) 25 & 26 Vict. c. 89, §§ 12, 34.

(*n*) 63 & 64 Vict. c. 48, § 12. This

Act repeals 30 & 31 Vict. c. 131, § 39.

(*o*) § 12 (6), and *ante*, p. 467.

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Sect. 4.

mentioned in a prospectus except subject to the approval of the statutory meeting (*p*). The meeting may adjourn, and at the adjourned meeting any resolution may be passed of which due notice has been given either before or since the original meeting, the adjourned meeting has the same powers as the original meeting (*q*). If the meeting is not held or the report is not filed with the registrar in compliance with the Act, any member may petition to have the company wound up, and upon hearing the petition the Court may either order the company to be wound up or give directions for the meeting to be held, or the report to be filed, or make such other order as may seem just (*r*).

Annual
meetings.

Auditors.

The Act of 1862 requires a general meeting of every company under the Act to be held once at least every calendar year (*s*). The meeting is to appoint an auditor or auditors to hold office until the next annual meeting (*t*), and to fix the auditor's remuneration (*u*). The report of the auditors is to be read before the company in general meeting (*x*).

Extraordinary
meeting.

The holders of not less than one-tenth of the issued capital of the company upon which all calls or other sums due have been paid may, notwithstanding anything in the regulations of the company, by a requisition stating the objects of the meeting, and signed and deposited at the company's office in accordance with the requirements of the Act, call upon the directors to convene an extraordinary general meeting of the company (*y*). If the directors fail to comply with the requisition within twenty-one days the requisitionists, or a majority in value of them, may convene the meeting (*z*). If a resolution which requires confirmation at another meeting is passed, and the directors fail to convene such other meeting within seven

(*p*) § 11.

(*q*) § 12 (7).

(*r*) § 12 (8). The Court may order the costs to be paid by the persons responsible for the default.

(*s*) 25 & 26 Vict. c. 89, § 49, and *Gibson v. Barton*, L. R. 10 Q. B. 329.

(*t*) 68 & 64 Vict. c. 48, § 21 (1). and in the case of banking companies registered with limited liability, see 42 & 43 Vict. c. 76, §§ 7-9.

(*u*) § 22.

(*x*) § 23. As to the duties of auditors, see *infra*, Bk. III. c. 3, § 4.

(*y*) § 13 (1) & (2). *Semble*, these rights are additional to the similar ones under Table A., *infra*, p. 477.

(*z*) § 13 (3). Until the expiration of 21 days the meeting can only be called by a board of directors, *State of Wyoming Syndicate* [1901], 2 Ch. 431.

days from the passing of the resolution, the requisitionists, or the majority in value of them, may convene the meeting (a). The requisitionists must convene the meeting in the same manner as nearly as possible as that in which meetings are to be convened by directors (b).

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Minutes of all resolutions and proceedings of general meetings are required to be kept by the Act of 1862, which moreover makes the minutes of any meeting admissible in evidence, if purporting to be signed by the chairman of that or of the next succeeding meeting (c).

In default of any regulations on the subject (d) every member has one vote; meetings are held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served in Table A. (e), five members are competent to summon a meeting, and any person elected by the members present is entitled to preside as chairman.

Provisions where no regulations as to meetings.

The members are also entitled by the Acts,

1. To have copies of the company's memorandum of association and articles (f).

2. To inspect and have copies of the register of members (g).

3. To inspect the register and the copies of mortgages and charges required to be kept by registered companies (h).

4. To have copies of all special resolutions (i).

5. To dismiss auditors appointed by the directors prior to the first statutory meeting (k).

6. To apply to the Board of Trade to appoint an auditor if one is not appointed at the annual general meeting (l).

7. To apply to the Board of Trade to appoint inspectors to examine the affairs of the company (m), and by special resolution to appoint such inspectors themselves (n).

(a) § 13 (4).

(b) § 13 (5).

(c) 25 & 26 Vict. c. 89, § 67, and ante, p. 468.

(d) § 52. As to the meaning of these words, see *Brick and Stone Co.*, W. N. 1878, p. 140. Table A. has regulations on all these subjects.

(e) See Table A., Nos. 35-95, and 97.

(f) 25 & 26 Vict. c. 89, § 19.

(g) § 32, and ante, p. 172.

(h) § 43; and 63 & 64 Vict. c. 48, § 14 (9), and ante, p. 314.

(i) 25 & 26 Vict. c. 89, §§ 54 & 19.

(k) 63 & 64 Vict. c. 48, § 21 (4).

(l) Ib. § 21 (2).

(m) 25 & 26 Vict. c. 89, § 56.

(n) § 60.

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Special
resolutions.

Modification of
the rights of
members under
powers in the
articles.

Alteration of
articles and
acting on them
as altered

8. To insist on the company being wound up (o).

9. In addition to these powers, the members are empowered by a special resolution, *i.e.*, a resolution passed by three-fourths, and afterwards confirmed by a majority of members, present in person or by proxy, and entitled to vote (*p*),—to alter the regulations of the company (*q*) to the extent already mentioned (*r*).

The members may also alter the memorandum of association within the limits allowed by the Acts, and in accordance with their provisions (*s*), but not otherwise.

The companies articles of association may give the members power to alter or modify their right *inter se* in some other manner than by an alteration of the articles. If this be so the provisions of the articles must be strictly complied with, and no alteration will be valid which is inconsistent with the provisions of the Acts (*t*).

Questions sometimes arise respecting the power at one and the same meeting both to alter the articles and to pass resolutions which are only valid after the articles have been altered. Unless care be taken this cannot be done. The articles must be altered first, and then a resolution must be passed to do that which they authorise as altered (*u*). But if proper notices are given (*x*) there is no reason why a special resolution should not be passed altering the articles, and another resolution (not special) be passed immediately afterwards at the same meeting (*y*). But two special resolutions cannot be passed in this way, if the second depends for its validity on the passing of the first (*z*).

(o) §§ 79 & 129, and 63 & 64 Vict. c. 48, § 12 (8). See, also, 30 & 31 Vict. c. 131, § 40.

(p) 25 & 26 Vict. c. 89, § 51. The decision of the chairman as to the result of the vote is final. See *ante*, p. 428. The resolution must be registered, § 53.

(q) § 50.

(r) See *ante*, pp. 461 *et seq.*

(s) See *ante*, pp. 456 *et seq.*; and see 30 & 31 Vict. c. 131, § 24, as to arrangements with respect to the amount and time for payment of calls on shares.

(t) See *Hemans v. Hotchkiss Ordnance Co.* [1899], 1 Ch. 115.

(u) *Patent Invert Sugar Co.*, 31 Ch. D. 166; *Imperial Hydropathic Hotel Co. v. Humpson*, 23 Ch. D. 1; *West India Steam Ship Co.*, 9 Ch. 1, note; and see *James v. Buena Ventura Syndicate* [1896], 1 Ch. 456.

(x) As to notices and amendments in the case of confirmatory meetings, see *ante*, p. 425.

(y) *Campbell's case*, 9 Ch. 1; *Taylor v. Pilsen Light Co.*, 27 Ch. D. 268.

(z) Compare the cases in the two last notes.

b.) Provisions of Table A.

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Table A.

By the regulations contained in Table A., the first ordinary general meeting is to be held at such time within six months after registration of the company, and at such place as the directors may determine (Nos. 29 and 31) (a). Subsequent ordinary general meetings are to be held, at such time and place as the members may determine; and if they do not fix a time and place, a general meeting shall be held on the first Monday in February in every year, at such place as the directors may determine (Nos. 30 and 31).

An extraordinary general meeting may be convened by the directors whenever they think proper (Nos. 31 and 32); and the directors are bound to call such a meeting whenever required so to do in writing by one-fifth of the members (Nos. 32—34). If the directors fail to comply with such requisition, the requisitioners, or any other members, being one-fifth of the whole, may themselves convene an extraordinary general meeting (No. 34) (b).

Seven days' notice at least, specifying the day, place, and hour of meeting is to be given to the members (c), by post or personal service (Nos. 95—97), or in such other way as the members in general meeting may direct (No. 35), but the non-receipt of such notice by any member does not invalidate the proceedings of the meeting (No. 35). Whenever an extraordinary meeting is called, or whenever it is intended at an ordinary meeting to do more than sanction a dividend, or consider the accounts, balance-sheets, and ordinary reports of the directors, the notice convening the meeting must state the general nature of the business to be transacted (Nos. 35 and 36) (d).

(a) The first meeting must now be held within the time required by the Act of 1900, § 12, *ante*, p. 473.

(b) They have now a similar and additional right under the Act of 1900, § 13, *ante*, p. 474.

(c) *Semble*, in the case of a deceased member it is not necessary to send him a notice or to send notice to his executors unless they are members. See *Allen v. Gold*

Reefs, Ltd. [1900], 1 Ch. 656. If notice is sent as though he were alive this is sufficient, at any rate, if the company has no notice of his death. *New Zealand Gold Extraction Co. v. Peacock* [1894], 1 Q. B. 622; *James v. Buena Ventura, &c., Syndicate* [1896], 1 Ch. 456.

(d) See *ante*, pp. 423 and 425, and the cases there cited.

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Resolutions.

No business, except the declaration of a dividend, can be transacted at any general meeting, unless a quorum of members is present when the meeting proceeds to business (No. 37). The quorum is ascertained as follows :—If the members of the company do not exceed 10, the quorum is 5 ; if they exceed 10, one must be added for every 5 additional members up to 50 ; and one for every 10 additional members after 50, until the quorum amounts to 20, which is in all cases a sufficient number (Table A., No. 37) (e).

Table A.
Dissolution of
meeting.

If within an hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of the members, shall be dissolved ; in any other case it shall stand adjourned to the same day in the next week, at the same time and place ; and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die* (Table A., No. 38).

Chairman.

The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the members (No. 39) (f). If there be no such chairman, or if at any meeting he is not present within a quarter of an hour after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman (No. 40).

Adjourned
meetings.

The chairman may, with the consent of the meeting, adjourn it from time to time, and from place to place, but no business can be transacted at any adjourned meeting, except the business left unfinished at the meeting from which the adjournment took place (No. 41) (g).

Votes.

At any general meeting a poll may be demanded by five or more members ; but if no poll is so demanded, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company is sufficient evidence of the fact, without proof of the number or proportion of votes recorded for or against the resolution (Nos. 42 and 43) (h).

(e) See, as to the quorums, *ante*, p. 208.

(f) For the power and duties of a chairman, see *ante*, p. 427.

(g) As to adjourned meetings, see *ante*, p. 425. The chairman need not adjourn at the request of

the majority. *Salisbury Gold Mining Co. v. Hathorn* [1897], A. C. 268.

(h) The declaration of the chairman in the case of a special resolution under § 51 of the Act of 1862 is conclusive evidence ; see *ante*, p. 428.

Every member is entitled to one vote for every share up to 10, and to one additional vote for every 5 additional shares up to 100, and to an additional vote for every 10 shares beyond the first 100 (No. 44) (*i*). A lunatic may vote by his committee (No. 45). If several persons are jointly entitled to a share or shares, the person whose name stands first on the register in respect of those shares, and no other person, is entitled to vote in respect of them (Table A., No. 46).

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No member can vote unless he has paid all his calls (No. 47) (*k*); and except for the first three months after the registration of the company, no member can vote in respect of any share acquired by transfer, unless he has held it for three months (No. 47).

Votes may be given personally or by proxy (No. 48) (*l*). The proxy must be a member of the company, appointed in writing, signed, and attested by one witness at least (No. 49). An instrument appointing a proxy is only good for a year (No. 50), and it must be left at the company's office not less than 72 hours before it can be acted upon (No. 50). A form of proxy is given in Table A. (No. 51); it must be duly stamped (*m*).

Proxies.

The members have, as has been already mentioned, power to elect (No. 52) and to increase or reduce the number of the directors (No. 63), and to fix their remuneration (No. 54), and by special resolution to remove them (No. 65).

Powers of
members.

The members are also entitled to see the accounts of the company (No. 78), and to appoint all auditors, except the first (No. 84) (*n*), and in the event of a casual vacancy (*o*).

(*i*) See as to voting, *ante*, p. 428.
(*k*) As to votes by the purchaser of forfeited shares when calls have not been paid by the original holder, see *Randt Gold Mining Co. v. Wainwright* [1901], 1 Ch. 184, a

case on another form of article.

(*l*) See *ante*, p. 429.

(*m*) *Ante*, p. 430.

(*n*) See, too, Companies Act, 1900, § 21.

(*o*) § 21 (5).

CHAPTER II.

OF THE FIDUCIARY RELATION OF PROMOTERS AND DIRECTORS TO
THEIR RESPECTIVE COMPANIES.Bk. III. Chap. 2.
Sect. 1.

SOME of the rights and duties of promoters and directors have been already examined, viz., their duties and liabilities with respect to contracts to take shares (*a*), with respect to prospectuses (*b*), and their rights and powers to bind their respective companies by contracts and other acts (*c*). The powers of directors as regards general management have also been alluded to (*d*); and their powers with reference to raising capital (*e*), making calls (*f*), transfers of shares (*g*), and the forfeiture of shares (*h*) will be noticed in succeeding chapters. But in addition to these matters it is necessary to investigate the extent to which promoters and directors are regarded as trustees for their respective companies and the consequences of being so regarded. The present chapter is devoted to this difficult subject.

SECTION I.—OF PROMOTERS.

Duty to observe
good faith.

The duties of partners to observe good faith to each other, not to overreach each other, and not to make separate profits or obtain secret advantages at the expense of their firm has been long recognised and enforced by the Courts of this country (*i*); and this duty commences as soon as the

(*a*) Bk. I. c. 1.

(*b*) Ib. cc. 1 & 3. See especially *ante*, pp. 47 *et seq.*, as to the disclosures which the Companies Act, 1900, § 10, requires to be made with reference to the property purchased by the company, and the interest of the directors and vendors

therein.

(*c*) Bk. II. c. 1.(*d*) Bk. III. c. 1.(*e*) Bk. III. c. 3.(*f*) Ib.(*g*) Bk. III. c. 4, § 5.(*h*) Ib. c. 6.(*i*) Partn. Bk. III. c. 2.

negotiations for a partnership commence (*k*). The general principles applicable to partners and to persons about to become partners are applicable to promoters of companies in their dealings with the companies which they create, and with the persons whom they induce to join such companies.

Nothing is more common than for persons to acquire property in order to re-sell it, to form a company on purpose to buy it at an advanced price, to make arrangements by which the company do buy it, and to conceal their own true position from the company they so form, and induce to buy. Such a transaction can never stand. There is nothing to prevent a person from buying property for himself at one price, and afterwards selling the same property to a company or any one else at a higher price; nor in a case of this simple description is the vendor bound to disclose the fact that he is selling at a profit (*l*). Moreover, there may be a valid sale to a company by a person engaged in getting it up (*m*), and there often is great difficulty in determining the true nature of any given transaction (*n*); but once let it be shown that the alleged vendor was engaged in obtaining property for a company which he was engaged in forming, or that he formed a company to buy property of his own, and it immediately follows that he cannot, without full disclosure on his part, hold the company to his bargain, or in the first case at all events (*o*) charge the company more than he actually gave.

There has been considerable discussion with reference to the meaning of the word promoter, and also with reference to his relation to the company he is endeavouring to form. The word itself has never been defined (*p*); but it is used in

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Projectors of
company making
a profit out of it.

Meaning of the
term promoter

(*k*) See *Hichens v. Congreve*, 4 Russ. 562, and 1 R. & M. 150; *Fawcett v. Whitehouse*, 1 R. & M. 132.

(*l*) See *Gover's case*, 1 Ch. D. 182, and *per James, L. J.*, in 5 Ch. D. 118.

(*m*) As in *Paul and Beresford's case*, 33 Beav. 204. See, too, the observations of V.-C. Wigram, in *Foss v. Harbottle*, 2 Ha. 489, and cases *infra*, pp. 503, 504.

(*n*) As in *Beck v. Kantorowicz*, 3 K. & J. 323, noticed *infra*, p. 495.

(*o*) See, as to this, the *Cape Breton Mining Co.*, 29 Ch. D. 795, noticed *infra*, p. 502.

(*p*) It is partially defined for the purposes of the Directors Liability Act, 1890, § 3 (2), but only so as to limit the word to a promoter who was party to the preparation of the prospectus, and to exclude persons who merely act in a professional capacity for those engaged in procuring the formation of the

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common parlance and also occasionally in the Companies Acts (*q*), to denote those persons who bring the company into existence, *i.e.*, by taking an active part in forming it or in procuring persons to join it as soon as it is technically formed (*r*). This description is sufficiently accurate for practical purposes, although as a definition it is too wide, for it includes persons, *e.g.*, mere printers and advertising agents, who are employed by the promoters, but who have nothing to do with the company or its formation in such a sense as to create any relation between it and them.

Relation to the
company.

The relation of a promoter to a company which he has taken part in forming, has been compared to that which subsists between an agent and his principal, and to that which subsists between a trustee and his *cestui que trust*. Of these analogies the last is the closest, although neither is perfect. The relation of principal and agent cannot exist between a company not yet created and those engaged in forming it (*s*); and what is done by them before the company is formed cannot be ratified by the company after its formation, unless the word ratified is used in a loose and inaccurate sense (*t*). On the other hand trusts for unborn persons are familiar in English law, and such trusts can be enforced by their objects when they come into existence.

A fiduciary
relation.

The real relation of promoters to companies is difficult to define; the relation is in truth *sui generis*, and is the result of dealings and transactions of a kind not known until recent times. The term by which accurately to define such relation has not yet been discovered. Familiarity with trusts and the language employed in connection with them has led to the description of the relation as a fiduciary relation (*u*); and although this is

company. In the Companies Winding-up Act, 1890, § 10, any person who has taken part in the formation or promotion of the company is referred to as a promoter. See, too, § 8 (3) of the same Act. In the Companies Act, 1900, promoters are alluded to in § 10 (1) "As any person engaged or interested in the formation of the company."

(*q*) See § 38 of the Companies Act, 1867, repealed by the Act of 1900,

and the Companies Winding-up Act, 1890, § 10, and with a more limited meaning in the Directors Liability Act, 1890. See last note.

(*r*) *Ante*, Bk. I. c. 3, § 2; *Emma Silver Mining Co. v. Lewis*, 4 C.P.D. 396; *Whaley Bridge Co. v. Green*, 5 Q. B. D. 109; *Gover's case*, 1 Ch. D. 182, and *infra*, p. 487.

(*s*) *Ante*, Bk. II. c. 1, § 2.

(*t*) *Ante*, Bk. II. c. 2, § 3.

(*u*) *Lagunas Nitrate Co. v. Lagunas*

not a very happy expression, it is not easy to suggest a better. Bk. III. Chap. 2.
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 What is meant is that although there is no actual relation of trustee and *cestui que trust* between a promoter and an unformed company, yet that when he has succeeded in forming it, he is liable to it in respect of frauds practised by him upon it, planned by means of agreements entered into before its formation, the real nature of which is carefully concealed from every one except those who profit by them. The frauds thus perpetrated are obvious when discovered; and the doctrine of fiduciary relation has been invented or extended in order to defeat them.

The following extract from the judgment of Lord Cairns in *Erlanger v. New Sombrero Phosphate Co.* (x) explains the position of a promoter very clearly:—

“It is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they propose to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.”

It must, however, be remembered that Lord Cairns was dealing with a case in which the dependence of the board of directors was concealed from the shareholders, and his remarks as to the necessity of an independent board are not

As to necessity of
an independent
directorate.

Syndicate [1899], 2 Ch. 392; 396; *Lydney, &c., Co. v. Bird*, 33
Erlanger v. New Sombrero Phosphate Co., 3 App. Ca. 1218; *Bagnall v. Co. v. Green*, 5 Q. B. D. 109.
Carlton, 6 Ch. D. 371; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. (x) 3 App. Ca. 1236.

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Co. v. Lagunas
Syndicate.

applicable to cases in which the position of the directors and their relation to the promoters is fully and fairly disclosed. This question was recently considered by the Court of Appeal in the case of the *Lagunas Nitrate Co. v. Lagunas Syndicate* (y), and gave rise to a difference of opinion; Rigby, L. J., was of opinion that the duty to provide an independent board was absolute, and that unless the board was independent any sale by the promoters to the company could be set aside by the company on this ground alone (z), but the majority of the Court (Lindley, M. R., and Collins, L. J.) decided that where, as in that case, the company is avowedly formed with a board of directors who are not independent, and who are openly stated to be the vendors or agents of the vendors, a sale by the promoters to the company cannot be set aside merely because the company had not an independent board (a). If, however, in such a case the promoters and the directors have been guilty of any breach of duty in connection with the promotion of the company not known to the members of the company, which would entitle the company to relief against the promoters, the directors cannot, without the authority of the company given after a full disclosure of the facts, release or discharge the promoters from the consequences of such breach of duty; nor will the company, so long as the original directors continue to control its affairs and conceal the facts, lose its right even to equitable relief by mere lapse of time (b). But even in these cases, if there has been no fraud, the company's right of rescission may be lost, in consequence of what the directors, acting *bonâ fide* in their capacity of directors and within the limits of their authority, have done in carrying on the business of the company (c).

Fiduciary
relation to
future
shareholders.

The fiduciary relation between a promoter and the company promoted by him and the consequent duty of disclosure is not

(y) [1899], 2 Ch. 392, noticed *infra*, p. 485, distinguishing *Erlanger v. New Sombrero Phosphate Co.*

(z) See [1899], 2 Ch. pp. 441-450.

(a) See [1899], 2 Ch. pp. 425-427 and p. 462. See, too, *Salomon & Co. v. Salomon* [1897], A. C. 22, noticed *infra*, p. 501, and *Laroque v. Beauchemen*, *ib.* p. 358.

(b) *Lagunas Nitrate Co. v. Lagu-*

nas Syndicate [1899], 2 Ch. 392, and *infra*, p. 532.

(c) *Ib.*, pp. 434 & 462. Romer, J., and the majority of the Court of Appeal, held that the right of rescission had been lost chiefly by the original directors having worked the property to such an extent as to render rescission unjust. See *infra*, p. 500.

limited to the promoter and the persons who may happen to be the shareholders at the time when the company first comes into existence; it extends also to future shareholders if their existence is contemplated (*d*). A so-called disclosure, therefore, by promoters to themselves in the capacity of directors of the company, or to nominees of their own, or to other persons interested with them in the transaction is in reality no disclosure to the company, although such persons may at the time be the only existing shareholders in the company. The disclosure must be such as to give future shareholders, if any are contemplated, a knowledge of all the material facts (*e*). If, however, when the company is formed there is no intention of admitting any other shareholders, full disclosure of all material facts to the existing shareholders will be sufficient (*f*).

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The disclosure must be full and fair; it is not sufficient that a close examination of the statements made and of the documents referred to by the promoters would enable an inquirer to ascertain the facts (*g*). It must extend to all material facts, and when promoters are selling to a company, a disclosure, however full and fair, that they are the vendors and are selling at a profit may not be sufficient; if there is any misrepresentation or concealment by them of other material facts relating to the property or its value the sale may be set aside. Moreover, in these cases it is not necessary to prove that the misrepresentation or concealment was the cause of the contract being entered into, or to prove that any individual was thereby induced to join the company; the breach

Extent of duty
of disclosure.

(*d*) See *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, and 5 Ch. D. at p. 113; *British Seamless Paper Box Co.*, 17 Ch. D. 467; *Postage Stamp Automatic Delivery Co.* [1892], 3 Ch. 566, where a prospectus was issued but no shares were allotted, and cases in the next note.

(*e*) *Gluckstein v. Barnes* [1900], A. C. pp. 247, 249, affirming *Olympia, Ltd.* [1900], 2 Ch. pp. 166-168, and 174-176, noticed *infra*, p. 492; *Lagunas Nitrate Co. v. Lagunas Syndicate*

[1899], 2 Ch. pp. 427, 428, noticed *infra*, p. 486. See, also, *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, noticed *infra*, § 2.

(*f*) See *Salomon v. Salomon & Co.* [1897], A. C. 22, noticed *infra*, p. 504; *British Seamless Paper Box Co.*, 17 Ch. D. 467.

(*g*) *Gluckstein v. Barnes* [1900], A. C. 240, noticed *infra*, p. 492. See, too, *Aaron's Reefs v. Twiss* [1896], A. C. p. 287. See, in the case of a prospectus, the Companies Act, 1900, § 10 (1) (*f*) & (2), *ante*, pp. 47 *et seq.*

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Syndicate (A).

of duty alone is sufficient to entitle the company to have the sale set aside (gg). The cases of *Gluckstein v. Barnes* and *Lagunas Nitrate Company v. The Lagunas Syndicate* already referred to, afford good illustrations of the extent of the duty now under discussion. The former case will be noticed hereafter (*infra*, p. 492); in the latter case (h) the facts were as follows:—

The Lagunas Syndicate, a limited company, and the owner of certain nitrate lands and works which it had purchased with a view to a resale some five years before, resolved through its directors to form a company to buy a portion of its property. The directors of the syndicate accordingly prepared a memorandum and articles of association for the proposed company, a form of agreement for the purchase of the property, and a prospectus. The memorandum and articles of association and the prospectus clearly stated that the directors of the company were the same persons as the directors of the syndicate, and that the property was to be purchased from the syndicate; the prospectus also stated that the syndicate was selling its property at a profit and at a price fixed by its directors, who held a considerable number of shares in the syndicate; the articles required the directors to carry out the purchase. Romer, J., and the majority of the Court of Appeal held that under the circumstances there was a sufficient disclosure on all these matters, and that as there was no proof or allegation that the price had not been fixed in good faith, the company were not entitled to any relief on this ground (i). The agreement and the prospectus, however, contained certain misrepresentations as to the condition and value of the land and works and the sufficiency of the water

(gg) *Lagunas Nitrate Co. v. The Lagunas Syndicate* [1899], 2 Ch. 392. *Semle*, such a breach of duty, if due to a want of care, may give rise to a claim for damages although the misrepresentations and concealment are not fraudulent if they have in fact been the cause of damage. See *ib.* pp. 436, 437.

(h) [1899], 2 Ch. 392. See, too, *Lady Forrest (Murchison) Gold Mine, Ltd.* [1901], 1 Ch. 582.

(i) See [1899], 2 Ch. pp. 409, 410, 431, and 463, and *ante*, p. 484. Rigby, L. J., however, thought the amount of profit ought to have been disclosed. See p. 453. See, too, *Salomon & Co. v. Salomon* [1897], A. C. 22, noticed *infra*, p. 504, and *Lady Forrest (Murchison) Gold Mine, Ltd.* [1901], 1 Ch. 582. As to the particulars required by the Companies Act, 1900, § 10, see *ante*, pp. 47 *et seq.*

supply, and did not state some facts relating to these matters which the Court thought the promoters ought to have disclosed. Bk. III. Chap. 2.
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The company was registered, and the purchase agreement was executed on behalf of the company by the directors. At this time the only members of the company were the seven directors and the solicitor and secretary of the syndicate; these persons were not misled by the misstatements or the non-disclosure (*k*). After the company had been registered and the agreement signed, the prospectus was issued by the company through its directors, and the public took a large number of its shares. The company subsequently sought to set aside the sale on the ground (amongst others) of the misrepresentations and non-disclosure above alluded to. Fraud was not alleged, and no one came forward to say that he had been misled by the prospectus. The Court of Appeal affirming, Romer, J., held that although the real facts were known to all the persons who were members of the company at the date when the contract was formally entered into, the formation of the company, as contemplated by its promoters, was not complete until its shares had been issued; that since, under the circumstances attending the promotion of the company and the constitution of its directorate, the knowledge of its directors could not be imputed to the company, it was their duty, as promoters of the company and directors of the promoting syndicate, to disclose all material facts to the intending shareholders of the company; and that having failed in this duty by publishing a prospectus which misrepresented some material facts and omitted others, the company was entitled to have the sale set aside (*l*), although, as the Master of the Rolls pointed out in his judgment (*m*), the loss which the company suffered was not caused by the issue of the prospectus or other acts of promotion, but by the directors having, in their capacity of directors of the company, executed and carried out the purchase agreement.

One of the greatest difficulties in connection with this subject is to determine when a promoter of a projected Commencement
of the fiduciary
relation.

(*k*) See [1899], 2 Ch. pp. 427, 428.

(*l*) Under circumstances not alluded to in the above statement, the majority of the Court of Appeal

decided that this right had been lost by subsequent dealings with the property. See *infra*, p. 500.

(*m*) [1899], 2 Ch. p. 436.

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company begins to be in such a position as to be unable to make a secret profit by a sale to it, or to persons acting on its behalf. On the one hand, it is quite plain that the so-called fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise (n). On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such a relation: something must be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately compose the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise; he also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty and who are in no way under his influence (o). A fraud by him on them will of course vitiate any agreement based on the fraud, whether there is any fiduciary relation between him and them or not; but the principles now being investigated pre-suppose the existence of that relation, and a breach of the obligations incidental to it, and no fraud other than that involved in their breach.

General caution. In dealing with any particular case care must be taken not to be misled by words. Owing to the ambiguity in the meaning of the word promoter, and the difficulty of defining his exact relation to the company he procures to be formed, it is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence, that he is liable to account to it as if he had been its trustee. The question in each case must be, what has the so-called promoter done to make himself liable to the demand made against him? What fraud or breach of trust has he committed or been party or privy to (p)? If none, he is under no liability: if any, he

(n) See the cases *ante*, p. 483, in note (u), and *Bank of London v. Tyrrell*, 10 H. L. Ca. 26; *Gluckstein v. Barnes* [1900], A. C. 240, noticed *infra*, pp. 491 *et seq.*

(o) Compare *Albion Steel Wire Co.*

v. Martin, 1 Ch. D. 580, with the other cases noticed in the text.

(p) See *Lydney, &c., Co. v. Bird*, 33 Ch. D. p. 93; *Whaley Bridge Co. v. Green*, 5 Q. B. D. 109.

is liable accordingly by whatever name he may be called or by whatever terms his relation to the company may be expressed. His liability, moreover, in such cases, is incurred by "fraud or breach of trust" within the meaning of the Bankruptcy Act, and is not therefore terminated by his bankruptcy and subsequent discharge (*g*) or by his death (*r*).

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The position of a promoter to the company he promotes will be best understood if the following propositions are borne in mind :—

1. A seller of property is under no obligation to inform the buyer how or when, or from whom, or at what price, or under what circumstances he, the seller himself, acquired it.

2. An agent to buy cannot charge his principal a greater price than the agent pays, and if he does so his principal can either repudiate the purchase and compel the agent to repay him the price he, the principal, has paid; or the principal can keep the property and recover from the agent the profit he has made by the transaction.

3. An agent to buy cannot sell his own property to his principal without informing him of the fact, and if he does so, the principal can repudiate the transaction. But it would seem that in this case, the principal cannot keep the property and recover from the agent the profit he has made by the transaction (*s*).

4. An agent cannot in any other way obtain secret benefits for himself at the expense of his principal in any transaction within the scope of the agency.

5. A person engaged in forming a company is treated as under the same disabilities in these respects as if he were its agent.

The cases illustrating these propositions, and their application to promoters of companies, are numerous and important; but their details are complicated and infinitely various. They group themselves into four classes, viz. :—

(*g*) *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122; *Ramskill v. Edwards*, 31 ib. 100.

(*r*) See *Bagnall v. Carlton*, 6 Ch. D. 371; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392; and *Ramskill v. Edwards*, 31 Ch. D.

100. See, too, *Concha v. Murietta*, 40 Ch. D. 543. As to statutes of limitations, see Trustee Act, 1888, 51 & 52 Vict. c. 59, § 8.

(*s*) See *Cupe Breton Co.*, 29 Ch. D. 795, noticed *infra*, p. 502, and the other cases there referred to.

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1. Cases in which promoters have been acquiring property and forming a company to take it at an enhanced price.

2. Cases in which promoters have sold their own property to a company formed by them to buy it.

3. Cases in which the promoters of a company have in other ways obtained secret benefits at its expense.

4. Cases in which the position of promoter has not been proved to exist, and in which, therefore, the doctrines applicable to promoters have not come into operation.

Rescission as
between original
vendor and
ultimate
purchaser.

Before, however, proceeding to discuss these cases, there is a question connected with the right to rescind contracts induced by misrepresentations which may be mentioned here, as the circumstances which give rise to it frequently occur in connection with the promotion of companies. The question alluded to is the right of rescission when there has been a series of agreements for sale the first of which was induced by misrepresentation. To take a concrete case. A. by misrepresentation induces B. to agree to purchase his property. B. subsequently agrees to sell the property at a profit to C., and A. ultimately conveys to C. Can B. and C. or either of them rescind the sale as against A.? If the contract between B. and C. is unimpeachable or unimpeached neither B. nor C. nor both suing together can do so, but if the contract between B. and C. can be and is set aside by C., so that B. has the property thrown back on his hands, it is apprehended that he can then claim rescission against A. (t). It must, however, be remembered that facts stated by A. to B. may involve a misrepresentation which would not be involved by a repetition of the statement by B. to C. (u).

1. *Cases in which promoters have been acquiring property and forming a company to take it at an enhanced price.*

In this class of cases a company is formed in order to buy property for a given price. The price really consists of two portions; one is what the property is fairly worth; the other

(t) *Edinburgh United Breweries Co. v. Molleson* [1894], A. C. 96.

(u) See *ib.* [1894], A. C. p. 111.
As to the recovery of payments

made to an assignee of a voidable contract, when the contract is set aside, see *Fleming v. Loe* [1901], 2 Ch. 594.

is what is called promotion money, and is enough to cover the legitimate expenses of forming the company, and to put large sums of money into the pockets of the promoters. The owner of the property may or may not be himself a promoter; but he gets no money until the company is formed and money is raised by the issue of shares or debentures. The fact that the company is being made to pay far more than an equivalent for what it gets is of course concealed, and the first directors are promoters or persons procured by them, and the shares they take are in fact paid for out of the promotion money. The contrivances to which recourse is had in order to rob companies in this way without being found out, are innumerable. The following are the leading cases of this class, and they are important enough to be noticed separately.

In *Hichens v. Congreve* (x), a company was formed to work a mine, and was principally got up by three of the defendants; it was proposed that a lease of the mine should be purchased by the company, and a lease to the company was executed by the owner of the property for 25,000*l.* This sum was accordingly charged to the company, but it afterwards turned out that 10,000*l.* only had been in fact paid to the owner for the lease, and that the remaining 15,000*l.* had been distributed amongst the directors. The three principal promoters of the company alleged that the property had been sold to them, on their private account, before the company had come into existence, that 25,000*l.* was a fair price for the company to pay for the lease, and that the 15,000*l.* was only a fair profit on a re-sale, the original purchase being entirely at the personal risk of the three. They said that the lease was taken directly to the company, and that the amount of the consideration money was stated to be 25,000*l.*, with the knowledge of the lessor, and merely for the purpose of simplifying the title. But it was admitted that only 10,000*l.* reached the lessor's hands, and that the 15,000*l.* had been divided amongst the defendants. A motion was made that the three principal defendants might be ordered to pay into Court such sums, part of the 15,000*l.*, as appeared

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Company entitled to sums received by directors.
Hichens v. Congreve.

(x) 4 Russ. 562, and 1 R. & M. 150. See, also, *Fawcett v. White-* house, 1 R. & M. 132, a somewhat similar case.

Bk. III. Chap. 2. by their answers to be then in their hands, and an order
Sect. 1. — to that effect was made.

Duty to make
full and fair
disclosure can-
not be evaded.
Gluckstein v.
Barnes.

Gluckstein v. Barnes (y) was a case of the same kind as the last, but the directors, by means of a partial disclosure, of waiver clauses in the prospectus and in the agreement for sale, and of a provision in the articles of association expressly authorising them to enter into and carry out that agreement, sought to prevent the company from impeaching the transaction or recovering the profit they made. The material facts were as follows:—In 1893 the National Agricultural Hall Co., Limited, was in course of winding up. Its property consisted (*inter alia*) of lands and buildings called Olympia, used for the purposes of exhibitions. This property was for sale, and was subject to debentures for 100,000*l.* and a mortgage for 10,000*l.* On the 19th January, 1898, a syndicate was formed, by an agreement of that date, for the purchase of Olympia with a view to a resale either to a company or some other purchaser (z). The agreement provided that the members of the syndicate were to subscribe the funds necessary for the purchase of the property and the payment of the expenses of forming the company; that the funds were to be placed in the hands of trustees who were to do their best to purchase Olympia and resell it at a profit; that if a company should be formed, four persons, namely, Lyons, Hart, Hartley, and Gluckstein, all members of the syndicate, had consented to be directors if duly elected, and the agreement nominated these four persons to be the trustees, with full powers of management and to do whatever might be necessary to buy and resell Olympia, and to promote the company and to purchase “as an interim investment” any mortgage of the National Agricultural Hall Co., Limited (a). In pursuance of

(y) [1900], A. C. 240, affirming *Olympia, Ltd.* [1898], 2 Ch. 153.

(z) Though the agreement referred to a sale to some purchaser other than a company, the Court held as a fact that the promotion and sale to a company was of the essence of the scheme. See [1898], 2 Ch. pp. 165, 171, 172, 180, and [1900], A. C. 247.

(a) There was also a provision that the sale should be subject to two other contracts, but these were not material, except as showing that the syndicate were really promoting the company when they were purchasing the property, no reference therefore is made to them in this statement.

this syndicate agreement, the four trustees—Lyons, Hart, Hartley, and Gluckstein—in January and February bought up some of the debentures and the mortgage on Olympia at sums much below their face value, and below what they eventually realised, and out of this transaction the syndicate made a profit of 20,724*l*. This was the profit in dispute (b). By an agreement of the 8th February, 1893, the trustees agreed to purchase Olympia for 140,000*l*., and paid a deposit of 20,000*l*. The price was ascertained by bids made in the chambers of the judge who ordered the sale. On 20th March, 1893, the four trustees as vendors entered into an agreement with one Close as trustee for the intended company, by which it was agreed that the company should buy Olympia at the price of 180,000*l*., of which 20,000*l*. was to be paid to the vendors in repayment of their deposit, 120,000*l*. was to be paid into court in discharge of the unpaid balance of 140,000*l*., and the rest was to be paid to the vendors. The agreement also provided (clause 7) that its validity should not be impeached on the ground that the vendors as promoters, or otherwise, stood in a fiduciary relation to the company, nor should the vendors be required to account for any profit made or to be made by them by the purchase of any debentures of the National Agricultural Hall Co., Limited, or any other charges upon the property of that company, which were to be satisfied out of the fund paid into Court. On the same day the company was registered. By its memorandum of association its objects were stated to be (1) the purchase of Olympia, and (2) the adoption and carrying into effect of the agreement with Close, with such modifications as might be agreed upon. The articles provided that that agreement should be ratified and binding, and required the directors to carry it into effect, and appointed the four vendors, Lyons, Hart, Hartley, and Gluckstein, the first directors. Shortly afterwards a prospectus was issued. It stated the names of the directors, the purchase price of 180,000*l*., and that the vendors were the only directors of the company, and that they, on behalf of a syndicate, had purchased

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(b) The profit to be made out of this transaction obviously depended upon the price to be paid for the purchase of Olympia, and this transaction was part of the general scheme; see [1898], 2 Ch. p. 164.

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the property for 140,000*l*. It also stated that "any other profit made by the syndicate from interim investments was excluded from the sale to the company." It referred to the memorandum and articles of association, the agreements of the 8th February, 1893, and of the 20th March, 1893, and stated they might be inspected. It also contained a waiver clause by which all applicants for shares should be deemed to have waived the insertion of the dates and names of the parties to the syndicate agreement, which had been vaguely referred to without any statement of its contents, and to have accepted the statements in the prospectus as a sufficient compliance with the provisions of § 38 of the Companies Act, 1867, or otherwise, and stated that all allotments would be made on that footing. The provisional agreement was adopted by the directors on behalf of the company, with some modifications, and the sale was completed. As already stated, the debentures and mortgage realised a sum of 20,734*l*. more than what the four vendors gave for them,—this profit came out of the proceeds of sale,—so that in substance the nominal price of 140,000*l*. exceeded the real price paid by the vendors by the sum of 20,734*l*. Of this sum 6,341*l*. went to the four vendors, the rest going to other members of the syndicate. The company subsequently got into difficulties, was ordered to be wound up, and the liquidator sought to recover the sum of 6,341*l*. from Gluckstein, but did not ask for rescission of the contract. The House of Lords, affirming the Court of Appeal, held (1) that Lyons, Hartley, Hart, and Gluckstein were acting as promoters of the company as from the date of the syndicate agreement; (2) that there had been no disclosure to the company of the profit made on the debenture transaction, that the prospectus was misleading, and had been framed with the fraudulent intention of making the shareholders believe that the only profit was the 40,000*l*., the difference between the nominal purchase price of 140,000*l*. and the sale price of 180,000*l*., and that though the mention in the prospectus of profits from interim investments might put a person on inquiry, and the agreement of the 20th March, 1893 (referred to and offered for inspection in the prospectus), would have shown that a further profit was being made, this was wholly insufficient;

(3) that the reference to the agreement of the 20th March, 1898, was not a sufficient disclosure to the shareholders of the unusual terms of clause 7; (4) that as there was no independent board, and all the directors were sharing the plunder, it would be absurd to impute the knowledge of the directors of the secret profit and of the terms of clause 7 to the company, and to hold that the adoption of that agreement, and the completion of the sale by the directors on behalf of the company, precluded the company from relief (c); (5) that the company were entitled to recover the 6,341*l.* with interest at 3 per cent., and Lord Macnaghten expressed a strong opinion that the four directors were jointly and severally liable, not only for the 6,341*l.* and interest at 3 per cent., but for the whole 20,734*l.* and interest at a higher rate (d).

Another and very instructive case is *Beck v. Kantorowicz* (e), in which one projector sought to obtain a benefit at the expense of the others, and they all sought to make a profit out of the company. In this case five persons proposed to purchase a mine, and to get up a company to work it. One of them, Kantorowicz, negotiated on behalf of himself and co-adventurers with the owners of the mine, and agreed with the owners for a purchase from them, at a sum of 85,000*l.*, and he represented to his co-adventurers that this sum was the least which the owners would take for the mine. In point of fact, however, there was an agreement between Kantorowicz and the owners, that if the mine was purchased at that price he was to have 20,000*l.* for his trouble; but this was unknown to the other adventurers and to the company which was afterwards formed. Upon the supposition that 85,000*l.* was the price of the mine, a contract for the sale of it at that price was entered into between the owners of the one part, and Kantorowicz and his four co-adventurers on the other. Part of the purchase money was to be paid in shares in the company proposed to be formed. Shortly afterwards a

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Alleged open
sale by pro-
jectors to
company.
*Beck v. Kan-
torowicz.*

(c) *Cape Breton Co.*, 29 Ch. D. 2 Ch. p. 170.

795, was distinguished on the ground that in that case the promoter had bought and paid for the property before the commencement of the fiduciary relation. See [1898],

(d) See [1900], A. C. p. 255, and *infra*, pp. 528 *et seq.*

(e) 3 K. & J. 230. See, too, *Ex parte Perrier*, 7 Ir. Ch. Rep. 256.

Bk. III. Chap. 2. prospectus was issued, with a view to the formation of the
Sect. 1. company: and in the prospectus it was stated that a contract
Beck v. Kan- had been entered into for the purchase by the company of
torowicz. the entire property for 125,000*l.*, including all preliminary
expenses, and a premium to the parties who had incurred the
risk and the responsibility of the original purchase. The
company was formed. The agreement between Kantorowicz
and the owners was afterwards discovered, and a bill was filed
by three of the committee of management of the company, on
behalf of themselves and other shareholders, for the purpose
of compelling Kantorowicz to account to the company for the
20,000*l.* premium which he had received in shares from the
vendors of the mine. On the part of Kantorowicz it was
insisted, first, that he had an interest in the mine, and was a
selling party, and that, therefore, he practised no fraud on the
four original adventurers; and secondly, that even if the
transaction could not be upheld as between him and them, the
company could not complain, as he and the other promoters
avowedly sold the property to the company for 125,000*l.*, and
the company had got all they ever expected, or had contracted
to have. But it was held upon the evidence, that Kantorowicz
had no interest in the mine, and that, as between him and the
other promoters, the transaction could not for one moment
stand. With respect to the more difficult question which arose
between Kantorowicz on the one side, and the company on the
other, it appeared in the first place, that two of the original
promoters were members of the committee of management.
In this latter capacity they became, as it were, agents for the
company, and were, as such, bound to buy for the company, at
as reasonable a price as possible, although in their character
of grantees they were entitled to sell at any price they liked.
It also appeared that the 125,000*l.* at which the company was
to buy was fixed by the committee of management, upon the
assumption that 85,000*l.* was, in fact, to be paid to the vendors
of the mine, and that the difference between 85,000*l.* and
125,000*l.* would cover the preliminary expenses, and what was
considered to be a fair premium for the promoters. This
premium was alluded to in the prospectus, and was a premium
of 30,000*l.*, to be paid out of the difference between the 85,000*l.*

and the 125,000*l.* Another premium, payable out of the 85,000*l.* to one of the promoters alone, was never contemplated in drawing up the prospectus. Upon these grounds it was held not to be competent to Kantorowicz to get a bonus of 20,000*l.*, in addition to his share of the 30,000*l.*, and that having kept back the transaction as to the 20,000*l.*, he ought to be considered as having joined the other four promoters in stipulating for payment by the company of a premium of 30,000*l.*, and no more. He in fact allowed them, in the exercise of their judgment as to what was a right premium to demand of the company, to contract with the company for the 30,000*l.*, and that was the contract which the Court held ought to be performed as between the company and the promoters (*f*).

Again, in *The New Sombrero Phosphate Co. v. Erlanger* (*g*), Bk. III. Chap. 2.
Sect. 1. a lease of some property was sold to an agent for a syndicate, New Sombrero,
&c., Co. v.
Erlanger. *i.e.*, a group of speculators. One of these speculators, on behalf of himself and the others, got up a company to buy the property from them. An agent of theirs entered into a provisional contract with a nominee of their own for the sale of the property to him, as trustee for the intended company, at the advanced price, to be paid for in cash and shares. The company's memorandum and articles of association were prepared under the direction of the chief promoter. There were five directors. Of these two were abroad, and the others were all in fact nominees, and more or less under the control of the chief promoter; one of them was the person who originally purchased as agent for him and the other speculators. The agreement between this agent and the trustee for the company was alluded to in the articles of association, and also in a prospectus published by the directors. This prospectus was in fact prepared under the instructions of the chief promoter.

(*f*) The result, it is apprehended, would not have been different if the four promoters had insisted on keeping the company to the bargain for 125,000*l.*, and had claimed to have the 20,000*l.* stipulated for by Kantorowicz divided between him and themselves. As it was, they

abandoned any interest they might have in the 20,000*l.* to the company.

(*g*) 5 Ch. D. 73, and 3 App. Ca. 1218. See the extract from Lord Cairns' judgment in this case, *ante*, p. 483, and the qualification thereof in *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392.

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The solicitor of the company was the solicitor of the promoters. The prospectus stated that the provisional contract with the trustee for the company had been approved by the directors, and in fact the directors in this country had adopted it; but they had in truth no discretion in the matter; they had no independent advice, and one of them was the trustee for the promoters. Their approval was therefore a mere sham. Upon the true facts becoming known, the company repudiated the contract, and filed a bill to set it aside. The V.-C. Malins dismissed the bill, being of opinion that the promoters of the company were not in such a fiduciary position towards it as to render it obligatory upon them to disclose that they were themselves selling their own property to the company. But on appeal, this decision was reversed upon the ground that the promoters stood in a fiduciary relation to the company, which was their creature; and were bound to disclose the fact that they were selling their own property to the company.

Phosphate
Sewage Co. v.
Hartmont.

In *The Phosphate Sewage Co. v. Hartmont* (h), the promoters had no title to the property they sold. The trustees of the company to whom they sold it were their own financial agents, and were paid a large commission by them out of the purchase money obtained from the company. The solicitors to the company were the solicitors to the promoters, and neglected their duty. The contract was set aside; the so-called trustees had to repay the commission they received; and all the defendants, including the solicitors, were ordered to pay the costs of the suit.

Bagnall v.
Carlton.

Bagnall v. Carlton (i), a company was formed to buy some property at a given price, which was much larger than the price paid to the owner. The difference went into the pockets of persons employed by him to get up the company, which was formed for the purpose of buying the property. This difference, however, less just allowances for expenses properly incurred in forming the company, was recovered by the company in an action brought against those who had divided the plunder (k).

(h) 5 Ch. D. 395.

(i) 6 Ch. D. 371.

(k) The 1,500*l.* paid to the solicitors, and sought to be recovered from them, was not paid out of the promotion money, see 6 Ch. D. 410.

In this case the company brought an action to rescind the contract of purchase, which having regard to the fraud perpetrated on the company, would clearly have been set aside if that action had not been compromised. Such compromise, however, did not affect the company's right to recover from the promoters the secret profit which they had made at the expense of the company. One of the promoters was dead, but his estate was held liable for what he had received.

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Emma Silver Mining Co. v. Grant (l), was another case in which part of the purchase money paid by the company for a mine was divided amongst the persons who took part in its formation, but who concealed from the company the fact that they were to have part of the purchase money. In substance they created the company and blinded it, and took advantage of its blindness to enrich themselves at its expense. In this case, as in others of the same sort, the promoters urged in vain that they were sellers; they were also creating the buyers, and came under obligations to them which had been disregarded. The promoters were compelled to repay to the company the sums they had obtained by their secret arrangements, but they were allowed all expenses fairly and properly incurred in forming the company. In this case the company did not seek any rescission of contract.

Emma Silver Mining Company v. Grant.

Lydney & Wigpool Iron Ore Co. v. Bird (m), is another case of the same class. The company was formed to buy a business. One of the defendants took an active part in forming the company, and was one of its first directors. The purchase money was fixed by him, and it included a large sum which he was to retain for his own benefit. This fact was concealed from the company, but was afterwards discovered. He was compelled to refund it, but was allowed all expenses fairly incurred by him in forming the company. No rescission of the contract of purchase was sought by the company. The other defendant was a partner of the first, but took no part in the formation of the company, except that he guaranteed the taking of a certain number of shares, and was paid for this guarantee.

Lydney, &c., Company v. Bird.

(l) 11 Ch. D. 918. See further as to the effect of bankruptcy, S. C. 17 Ch. D. 122, *ante*, p. 489, note (g). (m) 33 Ch. D. 85, reversing S. C., 31 Ch. D. 328.

Bk. III. Chap. 2. He was paid, in fact, out of money got from the company, but
 Sect. 1. he did not know this, and he was held not liable to refund the
 ————— payment.

The *Whaley Bridge Printing Co. v. Green* (n), noticed *infra*, p. 506, is based on the same principles as the foregoing, and belongs to the same class of cases.

Allowances made in these cases. The allowances made to promoters in cases of this description do not cover all the expenses they have in fact incurred: the allowances are confined to legitimate expenses; and do not extend to bribes or commissions paid to people who procure shares to be taken (o). Nothing can be allowed which would involve a misapplication of the company's funds (p).

No specific performance of contracts tainted with want of good faith. Such being the principles which the Court enforces, it need hardly be added, that contracts of the kind alluded to in the foregoing pages will not be decreed to be performed by the company, even although the company's articles of association provide that they shall (q). Any concealed agreement, moreover, between a vendor to a company and its directors, to the effect that they shall profit by the purchase by the company will entitle the company to repudiate its agreement with the vendor (r).

Option of company in such cases. The right of the company in these cases is to rescind the contract, or at its option to hold the property it has purchased, and to pay no more for it than its agent or trustee himself paid (s). But the right to rescission cannot be exercised if the property bought cannot be restored. The fact that the property has deteriorated in value is no bar to rescission if justice can be done between the parties by proper allowances and compensation, and in the case of fraud the Court will not regard too nicely the hardship which an order for rescission

(n) 5 Q. B. D. 109.

(o) *Lydney Co. v. Bird*, 33 Ch. D. 85, and *ante*, p. 499. The commission allowed in *Bagnall v. Carlton*, 6 Ch. D. 371, would not have been allowed if the company had not offered to allow it.

(p) *Ib.*

(q) *Maxwell v. Port Tennant, &c.*

Co., 24 Beav. 495. See, too, *Ellis v. Colman*, 25 Beav. 662; *Flanagan v. Gt. Western Rail. Co.*, 7 Eq. 116, a case of an agreement with a director.

(r) *Ex parte Williams*, 2 Eq. 216.

(s) See *Tyrell v. Bank of London*, 10 H. L. C. 26.

may inflict on the fraudulent party (t). The property cannot be retained unless the company is prepared to pay, or has paid what the promoters paid the owner for it (u). Bk. III. Chap. 2.
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2. *Cases in which promoters have sold their own property to a company formed by them to buy it.*

This class of cases is very similar to the last, but is distinguished from it by the fact that the promoters of the company buy and pay for the property which they afterwards form a company to buy, and which they ultimately sell to it.

The fact that the company is buying from its promoters is not disclosed to the company or to such of its directors as do not profit by the transaction, and on this ground the company can rescind the contract of purchase; but if the decisions about to be referred to are correct, the company has no other remedy. Consequently, if it cannot rescind, it is without redress. The leading cases on this subject are the following:—

Ladywell Mining Co. v. Brookes (x). In this case the defendants bought a leasehold mine in order to resell it at a profit to a company which was to be formed in order to buy the mine. At the time of the purchase nothing had been done to form a company. After the defendants had bought the mine and paid for it, they agreed to sell it at a profit to a trustee for the intended company, and a company was formed to buy the property at the enhanced price, and four of the original buyers became directors. The company bought the mine and paid the enhanced price out of capital raised by shares placed by the original buyers, who, in fact, found the money paid in respect of the shares. The company was ejected from the mine by the lessor, and it then sought to recover the profit made by Ladywell Mining
Company v.
Brookes.

(t) *Erlanger v. New Sombrero Co.*, 3 App. Ca. 1278; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392. In this case no fraud was alleged, otherwise rescission would have been granted (see pp. 433, 434). *Rigby, L.J.*, thought, as it was, rescission should be ordered. See pp. 460, 461.

(u) See *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586, and the cases in the next class.

(x) 35 Ch. D. 400.

Bk. III. Chap. 2. those who had bought the mine and resold it to the company.
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The Court, however, decided that the company were not entitled to this relief, because those who sold to the company were under no fiduciary relation to the company when they themselves bought it. The Court held that the only relief which the company could have been entitled to would have been to rescind the contract for purchase, and that as this was impossible, the company could obtain no redress. The company was not in a position to say, "when you bought this mine you were acting for us; this purchase, although made by you, is one which must be considered as having been made by you for the company, which was afterwards formed at your invitation" (y).

This case was decided in conformity with a previous decision of the Court of Appeal in the case of the *Cape Breton Co.*

Cape Breton
Company.

Cape Breton Co. (z). In this case certain persons bought a coal mine and paid for it. A company was afterwards formed to purchase it from them at an enhanced price. One of the original purchasers was a director of the company. The company was wound up; the facts became known; and at a meeting of shareholders specially convened in order to determine what should be done, they resolved not to repudiate the purchase, but to keep the mine and to resell it, which they did at a heavy loss. After this, a contributory of the company endeavoured to make the director who was one of the original purchasers liable for the loss sustained by the company, and it was decided that he was under no such liability. The House of Lords decided the case upon the ground that there was no proof that the director's interest in the property was not disclosed, and no proof that it had been sold to the company for more than it was worth. But Pearson, J., and the Court of Appeal (a), decided the case upon the ground that although

(y) 35 Ch. D. 413.

(z) 26 Ch. D. 221; 29 ib. 795, affirmed on appeal under the name of *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652. See on this case *Lydney and Wigpool, &c. Co. v. Bird*, 33 Ch. D. p. 94; *Ladywell Mining Co.*

v. *Brookes*, 35 Ch. D. p. 408, and the next two notes.

(a) I.e., Lord Justices Cotton and Fry; Bowen, L.J., dissented. The majority thought the value of the property could not be ascertained, and *qu.* if the decision would have

the company might have rescinded the contract, yet, that having adopted it, the director could not be made liable for any loss sustained by the company; because when the mine was originally bought, the purchasers bought for themselves and not for any company then in course of formation, and because it was impossible to ascertain the sum for which the director could be properly held responsible. The Court distinguished the case from *Bagnall v. Carlton* and others of that class, on the ground that in each of them the property sold to the company had been acquired by persons acting for a company then in process of formation, so that the company ultimately formed could say that the property was in truth bought on its behalf. The distinction here drawn between a company contemplated by the buyers but not yet in process of formation, and a company, the formation of which has just commenced, is very fine, the more so, as it was conceded that the company ultimately formed may have been very different from that which the promoters were endeavouring to form when they became purchasers themselves. It is much to be regretted that the House of Lords did not express an opinion on the broad point on which the members of the Court of Appeal differed. The author has always preferred the judgment of Lord Justice Bowen, but the decision of the majority of the Court has been followed (b) and approved by the Privy Council in the recent case of *Burland v. Earle* (c).

In contrast with the foregoing cases the case of *Salomon v. Salomon & Co.* (l) may be usefully referred to, as showing that a man may, without incurring any liability, promote a com-

Full disclosure.
Sale upheld
though company
had no independent board.

been the same if they had thought otherwise; apparently not, see the judgment of Cotton, L.J., in *Ex parte Taylor* and *Ex parte Moss*, 14 Ch. D. 398, and 35 Ch. D., p. 408.

(b) *Lady Forrest (Murchison) Gold Mine, Ltd.* [1901], 1 Ch. 582. Wright, J., expressed an opinion in favour of the view taken by Bowen, L. J., but felt bound by authority.

(c) *Burland v. Earle*, Times, 11 Nov., 1901. See, too, 3 App. Ca.

1235, per Cairns, L.C.

(l) [1897], A. C. 22, reversing the decision of the Court of Appeal, *Broderip v. Salomon* [1895], 2 Ch. 322. This case established the legality of "one man" companies. See ante, p. 160. See also *Wragg, Ltd.* [1897], 1 Ch. 796, and *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392, noticed ante, p. 486, where the public also took shares in the company.

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pany for the purpose of purchasing his own property, constitute the company with a board of directors consisting only of himself and his nominees, and sell his property to the company so constituted at his own price, provided that a full disclosure of the conditions under which the company is formed and of the price to be paid is made not only to the directors, but also to the company.

Salomon v.
Salomon & Co.

In this case Salomon, the owner of a business, with the design of transferring it to a limited company, which was to consist exclusively of himself and members of his own family, entered into a preliminary agreement for the sale of his business to the company at a price fixed by himself. No one examined or checked the price on behalf of the company either before or after its formation. The company was afterwards formed, and the memorandum of association was signed by Salomon, his wife, daughter, and four sons, each for one share. In accordance with the provisions of the articles of association, the subscribers of the memorandum appointed Salomon and his two sons to be directors; the directors appointed Salomon chairman, and resolved that two directors should form a quorum; the chairman was entitled to a casting vote. The preliminary agreement was formally adopted and carried out with some slight modifications; the business was transferred to the company, and the purchase price paid partly in cash and partly in debentures, which were issued to one Broderip, a creditor of Salomon. Subsequently 20,000 shares were allotted to Salomon, and paid for out of the purchase money. These were the only shares ever allotted, except the seven which were allotted to the seven signatories of the memorandum of association; no shareholders other than the original seven ever joined the company. The business was solvent at the time of the sale, but the company subsequently fell into difficulties, and the interest on the debentures fell into arrear. Broderip commenced an action to enforce his security, and the company was ordered to be wound up. The liquidator, on behalf of the company and its creditors, amongst other relief, sought to have the sale set aside, to recover the purchase price from Salomon, or to make him indemnify the company against its debts, and to

have the debentures cancelled on the ground that Salomon was a promoter of the company, that the price was grossly exorbitant, and the company had no independent advice, and that the whole transaction was a mere sham and a fraud on the company and its creditors. The House of Lords^(m), however, held that the transaction was a real sale and that, whether the price was excessive or not, as the business was solvent at the time of the sale, and all the shareholders knew of the conditions under which the company was formed, and the price which was to be paid, and as there was never any intention of issuing any further shares, and no further shares were in fact ever issued, the transaction was not fraudulent, that the sale could not be set aside, that no relief by way of indemnity or otherwise could be granted against Salomon, and that Broderip was entitled to enforce his security^(o).

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In the case of a "one man" company such as that just noticed the question of price is not of paramount importance, as whatever is paid by the company is in substance paid by the vendor. If, however, other people are to be invited to join the company, the price, if fixed by the vendor, must be fixed in good faith^(p).

3. *Cases in which the promoters of a company have in other ways obtained secret benefits at its expense.*

Promoters of companies are exceedingly ingenious in the devices to which they have recourse in order to obtain money without being found out, from the companies they call into

^(m) [1897], A. C. p. 22. The decision of the Court of Appeal, *sub. nom. Broderip v. Salomon* [1895], 2 Ch. 329, which was reversed by the House of Lords, was based on the ground that the whole scheme was a device to enable Salomon to trade with limited liability contrary to the true meaning of the Companies Acts, and, by means of the debentures, to obtain priority over the creditors of the

company.

^(o) Such a transaction may be set aside if it is an act of bankruptcy on the part of the vendor, or a fraudulent conveyance under the statute 13 Eliz. c. 5. See *Carl Hirth* [1899], 1 Q. B. 613.

^(p) In *Lagunas Nitrate Co. v. Lagunas Syndicate*, noticed *ante*, p. 486, the good faith of the directors was not impeached.

Bk. III. Chap. 2. existence. The principles, however, before expounded are
Sect. 1. ——— generally sufficient to defeat them.

*Emma Silver
Mining Co. v.
Lewis.*

In *Emma Silver Mining Co. v. Lewis* (q), a promoter who procured himself to be appointed metal broker to the company on certain terms which were disclosed, also managed to obtain a large sum in addition out of the promotion money, which (as is usual), was added to and hidden in the price paid by the company for the property it bought. But he was compelled to refund what he so surreptitiously obtained.

*Mann v.
Edinburgh
Tram. Co.*

Mann v. Edinburgh Tramways Co. (r) affords another instance of the same class. The company had obtained an Act authorising it to construct certain tramways, containing the usual clause that the expenses of obtaining the Act should be paid by the company. M. was the solicitor and B. the engineer of the company, and both were promoters of the Bill. M. and B. negotiated an agreement between the company and the contractors under which the contractors were to carry out certain works and pay the costs of obtaining the Act. On the next day M. and B. agreed with the contractors to relieve them of their liability to pay these costs in consideration of a sum of 17,000*l.* This agreement was not communicated to the company. The company were held entitled to recover from M. and B. the difference between the 17,000*l.* and the sums properly expended by them in paying the costs of obtaining the Act.

Gluckstein v. Barnes, noticed *ante*, pp. 492 *et seq.*, may also be referred to under this head.

*Whaley Bridge
Printing
Company v.
Green.*

Whaley Bridge Printing Co. v. Green (s) goes a step further. In that case the company agreed to buy property for 20,000*l.*, of which (by an agreement concealed from the company) 3,000*l.* was to be paid by the vendor to its promoter. The company had paid the 20,000*l.*, but the vendor had not paid over the

(q) 4 C. P. D. 396, an action for damages.

(r) [1893], A. C. 69. The payment of any sum beyond the actual costs of the Act was *ultra vires* the company (see *ante*, p. 197). The

judgments were based partly on this ground; the fact precluded any ratification of the payment by the company.

(s) 5 Q. B. D. 109. See further as to bribes, *infra*, p. 514, note (y).

whole of the 8,000*l.* The company recovered so much of the 3,000*l.* as remained unpaid from the vendor upon the ground that the company was entitled to the benefit of the agreement made by the promoter. There was no rescission of contract here, nor was it considered necessary; the company sued as an undisclosed principal.

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The principles illustrated by the foregoing decisions apply, if possible, more strongly to the solicitors of projected companies than to other persons. The relation of solicitor and client in cases of this sort is considered as commencing from the time when the solicitor first acts in any matter relating to the company; and if he afterwards acquires property for himself and sells it at a profit to the company, without the fullest disclosure, the company can retain the property and compel him to refund the profit(*t*). Moreover, if the solicitor to the company is, as he frequently is, the solicitor to the promoters, and he neglects his duty to the company when he knows that the promoters are acting improperly towards it, he runs the serious risk of being held liable to the costs of proceedings against them(*u*): but he ought not to be made a party if the only relief sought against him is the payment of costs(*x*).

Solicitors to
projected
companies.

4. Cases in which the position of promoter has not been proved to exist.

The most instructive case of this kind is the *Albion Steel and Wire Co. v. Martin*; and its value consists in the contrast it affords with those already noticed.

In the *Albion Steel and Wire Co. v. Martin* (*y*), two persons carried on a business which was afterwards sold to a company formed in order to buy it. The defendant had long supplied

Albion Steel
and Wire Co.
v. Martin.

(*t*) *Tyrrell v. Bank of London*, 10 H. L. C. 26, affirming mainly, but in some respects varying the decree below, in 27 Beav. 273. The company bought only part of what its solicitor had purchased, and the House of Lords held that the company had nothing to do with the profit made by reselling the rest of the property. Compare *Bagnall v. Carlton*, 6 Ch. D. 371.

(*u*) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394. See generally, *re Blundell*, 40 Ch. D. 370.

(*x*) *Bagnall v. Carlton*, 6 Ch. D. 371; *Barnes v. Addy*, 9 Ch. 244; *Burstall v. Beyfus*, 26 Ch. D. 35.
(*y*) 1 Ch. D. 580.

Bk. III. Chap. 2. Sect. 1. the vendors with goods for their business, and at their request he agreed to become a director of the company. After he had so agreed, and before the company was formed, he contracted to supply goods to the vendors, and these contracts were not completed when the company took over the business. The business was taken over with all contracts pending at the time of its transfer, and the defendant completed the contracts into which he had entered, and was paid by the company of which he had become a director. An attempt was made by the company to compel him to account for the profit made by him, at the expense of the company, from these contracts. But it was held that he was not bound to do so. There was no fraud whatever in the transaction; the defendant had dealt with the vendors; they had dealt with the company; the company had trusted them, and he was not concerned directly or indirectly in the purchase by the company of their business, and was not directly or indirectly in the double position of buyer and seller; and in his own contracts with the vendors they were the guardians of the interests of the company. In this same case, however, the defendant had, after he had become a director, entered into similar contracts with the company itself, but he did not attempt to retain the profits on them, and it is plain that he could not have done so.

Companies
Act, 1900.

Payment for
services.

The liability of promoters and others who issue prospectuses and fail to comply with the provisions of the Companies Act, 1900, has been already noticed; see *ante*, p. 124 (*yy*).

Before leaving this subject it will be useful to refer to the rights of promoters to payment for their services. What will be allowed them on setting aside transactions with them has been seen already (*z*). But in addition to this it is to be observed that promoters of companies are not entitled to charge each other for their services, unless there is some agreement to that effect (*a*); nor have they any claim for

(*yy*) For the provisions referred to, see *ante*, pp. 44 *et seq.* As to the repealed § 38 of the Companies Act, 1867, see *ante*, pp. 128 *et seq.*

(*z*) *Ante*, pp. 500 *et seq.*

(*a*) *Holmes v. Higgins*, 1 B. & C. 74; *Goddart v. Hodges*, 1 Cr. & M. 33; *Wilson v. Curzon*, 13 M. & W. 532; *Parkin v. Fry*, 2 C. & P. 311.

their services against the company they have formed in the absence of some clause to that effect contained in the company's special Act or charter (b), or (in other cases) in the absence of some agreement entered into by the company and binding the company to pay them (c). Moreover, even an express agreement for their remuneration may be *ultra vires*, and not binding on the company on that ground (d).

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SECTION II.—OF DIRECTORS AND THEIR POSITION AS TRUSTEES.

As soon as the formation of the company as contemplated by its promoters (e) has been completed, the difficulties peculiar to promoters disappear.

The same obligation to good faith which exists on the part of every member of an ordinary firm (f) exists also on the part of every member of a company; but, in this latter case, the obligation of each member towards the others is qualified by the comparatively small right of personal intervention in the affairs of the company which each member enjoys (g). It is part of the contract into which the members of a company enter, that the management of its concern shall be confided to a few chosen individuals. But whilst this contract limits the right of each member of the company to interfere in the conduct of its affairs, and limits his obligation to exert himself for the benefit of the company, it, if possible, increases the obligation of the directors to observe good faith towards the great body of shareholders, to attend diligently to their interests, and to act within the limits of the authority conferred by them. Directors are not only agents, but to a certain extent trustees

Good faith
amongst
shareholders.

(b) As in *Carden v. The Gen. Cemetery Co.*, 5 Bing. N. C. 253. 2 Ch. pp. 427, 428, noticed *ante*, p. 486.

(c) *Ante*, Bk. ii. c. 1, § 2.

(f) As to which, see Partn. bk. iii. c. 2, pp. 314 *et seq.*

(d) See as to this, Bk. ii. c. 2, § 2.

(e) Promotion does not necessarily cease on the technical formation of the company. See *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899],

(g) As to voting on questions on which interests are conflicting, see *ante*, p. 428.

Bk. III. Chap. 2. for the company and its shareholders (h). Their position,
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Directors
trustees.

however, is very different from that of ordinary trustees, whose primary duty it is to preserve the trust property, and not to risk it. Directors have to carry on business, and this necessarily involves risk (i). The duty of directors to shareholders is so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people. Directors should remember that they are not the masters but the servants of the shareholders; and although it is true that the directors have more power, both for good and for evil, than is possessed by the shareholders individually, still that power is limited, and accompanied by a trust, and is to be exercised *bonâ fide* for the purposes for which it was given, and in the manner contemplated by those who gave it. The property of the company may not be legally vested in the directors, but it is practically under their control; and they are bound to employ it for the purposes for which it is entrusted to them. So the powers which the directors have, *e.g.*, of calling meetings, electing members of their own board, allotting, transferring and forfeiting shares, making calls, &c., &c., are reposed in them in order that such powers may be *bonâ fide* exercised for the benefit of the company as a whole; and any exercise of such powers for other purposes is regarded as a breach of trust, and is treated accordingly (k). But the directors are in no sense

(h) *Lands Allotment Co.* [1894], 1 Ch. 617 and *per Kay, J.*, in *Faure Electric Accumulator Co.*, 40 Ch. D. p. 151. Not for the company's creditors, see *Poole, Jackson & White's case*, 9 Ch. D. 322, and *Wilson v. Lord Bury*, 5 Q. B. D. 518.

(i) See *per Bacon, V.-C.*, in *London Financial Assoc. v. Kelk*, 26 Ch. D. 143, and *per Stirling, J.*, in *Sheffield & South Yorks. Building Soc. v. Aizlewood*, 44 Ch. D. pp. 452 *et seq.*, where an attempt was

made to distinguish the position of directors of building societies from that of directors of other companies.

(k) See generally as to the duties of directors, *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56; *Faure Electric Accumulator Co.*, 40 Ch. D. 141; *York and North Midland Rail. Co. v. Hudson*, 16 Beav. 485; *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586, and *infra* p. 377.

trustees of their individual interests in the company; thus they may transfer their shares in order to avoid a call (*l*), or exercise their voting power in a general meeting (*m*) on the same footing and with the same freedom as any other shareholder.

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It follows as a necessary consequence of their position that directors of a company are bound to account to the company for all profits made by themselves by the employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of all the facts, has agreed to allow them to retain such profits for their own benefit.

Directors must account for profit made by employment of the company's assets.

The duties of directors begin from the moment they become directors; but persons who are directors may have come under obligations to the company long before they became directors of it. Whether they have done so or not depends upon the principles investigated in the last section (*n*). In the ensuing pages it is proposed to examine the duties of directors after they have become such. All the authorities referred to in the last section are relevant to the present inquiry, and may be referred to in support of their liability to account for profits secretly made by them (*o*). In addition to those authorities the following may be also usefully alluded to.

Commencement of duties of directors.

In the celebrated case of *The York and North Midland Railway Company v. Hudson* (*p*), a quantity of shares in a railway company were placed at the disposal of its directors, amongst whom the defendant was the most influential. The defendant disposed of these shares by issuing some 5,000 of

Profits made by employment of assets of company.
Directors selling shares for their own benefit.
York and North Midland Rail. Co. v. Hudson.

(*l*) *Cowley & Co.*, 42 Ch. D. 209.

(*m*) *North West Transportation Co. v. Beatty*, 12 App. Ca. 589. *Burland v. Earle*, Times, 11 Nov., 1901.

(*n*) They had, for example, in *Hichens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, ib. 132; and *Barnes v. Gluckstein* [1900], A. C. 240; but not in *Albion Steel Wire Co. v. Martin*, 1 Ch. D. 580.

(*o*) The decision of the Court of Appeal in the *Cape Breton Co.*, ante,

p. 502, also applies to them, see *Burland v. Earle*, Times, 11 Nov. 1901. See, too, *Silkstone and Haigh Moor, &c., Co. v. Edey* [1900], 1 Ch. 167, where a secret purchase of the company's property by its liquidator was set aside.

(*p*) 16 Beav. 485. The judgment in this case is particularly valuable with reference to the position of directors.

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2. them to nominees of his own, causing them to be sold for his benefit and putting the proceeds of the sale into his own pocket, accounting, however, to the company for the money due on them in respect of deposits and calls. The defendant contended that the shares in question were in fact a present to himself, in consideration of his great services to the company; but the Court thought otherwise, and having come to the conclusion that the shares were to be at the disposal of the directors as trustees for the company, compelled the defendant to account for the monies derived by him from their sale. The Court also held, that the defendant was not entitled to be allowed any part of such monies by way of remuneration for his services, or on account of money disbursed by him for the company in a manner which he either could not or would not explain (q).

Profits made on
issuing shares.
Parker v.
McKenna.

In *Parker v. McKenna* (r), a banking company resolved to issue 20,000 new shares, and those not taken up by the old shareholders were to be disposed of by the directors at a certain price. The old shareholders only took up about one half of the shares; and the directors made an arrangement with one *Stock* that he should take all the rest at the price fixed, and pay for them as he found purchasers for them. He was unable to pay for them all, and he applied to the directors to take a large part of them off his hands. Some of them agreed to do so; and each of the defendants took a certain number, sold what he took at a price considerably higher than that at which the directors had been authorised to sell them, but only accounted to the company for that price. When, however, the shareholders discovered what had been done, they claimed to be entitled to share all the profits thus made by the defendants, and their claim was upheld by the Court. It was conceded in this case, that if the directors had actually sold the shares to *Stock*, and he had *bonâ fide* paid for them and completed his title to them, the directors (or any one else) might have bought them

(q) In *Dunston v. Imperial Gas Co*, 3 B. & Ad. 125, it was held that directors are not impliedly entitled to any pay for their services; and see, as to a company making

presents to directors, cases *ante*, p. 439, notes (r) and (s), and p. 443, note (p).

(r) 10 Ch. 96.

from him and resold them at a profit; but the arrangement with him was such that the shares had never become his; the duty of the directors to the shareholders with respect to the disposal of the shares had not been performed when they were taken off his hands, and the shares were in effect under the control of the directors as unissued shares when the defendants themselves sold them at a profit.

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So again in *Shaw v. Holland* (s), where shares in the company had been allotted to two directors and their nominees at an undervalue, the two directors were ordered to account for all profits made by them or their nominees from such of these shares as had been sold, and to pay to the company the difference between the price at which such of the shares as remained unsold had been allotted to them, and the value of those shares at the time of allotment.

Shaw v. Holland.

Again, the directors of a company are not entitled to retain for their own benefit any advantages they may receive by way of bonus, commission, or otherwise on the sale of the company's business, or on the amalgamation of the company with some other (t), unless there is an agreement to the contrary between the company and the directors (u). In *Gaskell v. Chambers* (r), the directors of a company, which amalgamated with another company, received from the latter a considerable sum, the particulars of which they kept secret. In a suit instituted on behalf of the shareholders in the first company, this money was held *prima facie* to belong to them, and it was ordered to be paid into Court (x).

Bonuses, &c.,
on sales, &c.

Gaskell v. Chambers.

(s) [1900], 2 Ch. 305; notice the article in this case giving the directors an option to take shares at par in consideration of their finding subscribers for the company's capital, and the doubt as to its validity expressed by Rigby, L. J. See now as to such an option, *ante*, p. 44. As to the value to be put on the shares in such cases, see *infra*, p. 515.

(t) *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339; *General Exchange Bank v. Horner*, 9 Eq. 480.

(u) *Southall v. British Mutual*

Society, 6 Ch. 614, where it was agreed that a part of the purchase money should be paid to the directors by way of bonus. See, also, *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189, noticed *infra*, p. 517, and as to necessity of disclosing the interest of the directors in the proposed sale in the notice calling a meeting to approve it, *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 358; *Tiessen v. Henderson* [1899], 1 Ch. 861.

(v) 26 Beav. 360.

(x) *Ibid.*

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Bonuses from
promoters on
formation of
company.

So, if on the formation of a company, its directors receive bonuses or other advantages from the promoters on a sale to the company, or on the adoption or ratification of a contract by the company, they can be compelled to account for what they so receive (y). After the contract has been adopted by the company it is the duty of the directors to guard the interests of the company in carrying it out. They can, therefore, be compelled to account for anything which they may receive from the promoters so long as any questions are open between them and the company (z).

Other instances
of secret profit
on formation of
company.

The devices to which directors have had resort in order to obtain a secret profit for themselves are ever varying, but whatever form the transaction assumes the same principle applies; thus in one case a director had his name inserted in a lease in order that he might make a profit as vendor of the

Bribes and
secret com-
missions.

(y) See *Madrid Bank v. Pelly*, 7 Eq. 442, and the next nine notes and the cases *ante*. A principal whose agent has been bribed in order to induce him to enter into a contract with the briber may recover the amount of the bribe from the agent, see *Mayor of Salford v. Lever* [1891], 1 Q. B. 168, and cases referred to in the text, but cannot follow the money received as if it were trust money. *Lister & Co. v. Stubbs*, 45 Ch. D. 1. As against the briber he may elect to sue upon the contract to pay the bribe and recover from the briber so much of the bribe as has not been paid over, *Whaley Bridge Printing Co. v. Green*, 5 Q. B. D. 109, noticed *ante*, p. 506, and *semble* he will not be bound by any compromise or alteration of the original agreement entered into with the agent without his authority, see *Grant v. Gold Exploration, &c., Syndicate* [1900], 1 Q. B. p. 251. If the briber knows that the person bribed is an agent of, or in a fiduciary position to the other contracting party (see [1900], 1 Q. B. pp. 246, 247), the

briber and the agent are jointly and severally liable to him for any damage he may have suffered by having entered into the contract; and if these damages are quantified by the contract, as by being calculated on a percentage of the money paid, they can be recovered as money had and received from the briber, if he has been paid the consideration for the contract, or from the agent if he has received the bribe; this remedy is independent of and additional to the right of action against the agent to recover the bribe. *Mayor of Salford v. Lever* [1891], 1 Q. B. 168; *Grant v. Gold Exploration, &c., Syndicate* [1900], 1 Q. B. 233; in such cases the principal may rescind the contract. *Panama Telegraph Co. v. India Rubber, &c., Co.*, 10 Ch. 515; *Smith v. Sorby*, 3 Q. B. D. 552, note. An action will not lie by the agent against the briber for payment of the promised bribe, *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

(z) *Eden v. Ridsdales Rail. Lamp, &c., Co.*, 23 Q. B. D. 368.

property to the company when in reality he had no interest in the property (a). In another case a director entered into a secret agreement with the promoter that the promoter should buy from him his qualification shares at the price he paid for them, and having bought them at par he sold them to the promoter at their nominal value, when they had in fact become valueless (b). In the former of these cases the director was compelled to account for the profit made, and in the latter to pay to the company the money he had received from the promoter for the shares.

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Again, directors are not entitled to retain any shares or other benefit which may have been given them by the promoters of a company in order to induce them to become directors or to qualify them for that office. In *Nant-y-Glo v. Grave* (c), Grave consented to become a director of the plaintiff company, on receiving from one of the promoters five hundred fully paid up shares, and subsequently acted in that capacity. Some years after he had ceased to be a director, an action was instituted against him by the company to recover these shares or their value. The shares being at that time very much diminished in value, Grave was ordered to pay to the company a sum equivalent to the highest value they had reached since they had been transferred to him, together with interest from that time at four per cent.

Persons receiving shares, &c., from promoters as consideration for becoming directors.

Nant-y-Glo v. Grave.

When in these cases a director is made to account for the value of shares improperly obtained by him, the value to be ascertained is the highest value which the shares have reached

Value of shares, how ascertained.

(a) *Bland's case* [1893], 2 Ch. 612. The articles allowed vendors who were directors to keep their profit, but it was held that this did not protect a merely nominal vendor.

(b) *Archer's case* [1892], 1 Ch. 322. See, too *Great North West, &c., Rail. Co. v. Charlebois* [1899], A. C. 114, where a director made a secret profit out of a construction contract; the case, however, was decided on a question of *ultra vires*.

(c) 12 Ch. D. 738. See, also, *McKay's case*, 2 Ch. D. 1; *De*

Ruvigne's case, 5 Ch. D. 306; *Pearson's case*, ib. p. 336; *Englefield Colliery Co.*, 8 Ch. D. 388; *Weston's case*, 10 Ch. D. 579; *Mitcalfe's case*, 13 Ch. D. 169; *Carriage Co-operative Supply Association*, 27 Ch. D. 322, cases of a similar nature under § 165 of the Companies Act, 1862. See, too, *Postage Stamp Automatic Co.* [1892], 3 Ch. 566, in which case Vaughan-Williams, J., held there had been a sufficient disclosure of interest to entitle the directors to keep some of the shares, but not others.

Bk. III. Chap. 2. since they have been in his hands (d). The price at which
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some shares have been sold may be a sufficient test of this value (e), but is not necessarily so; each case must depend on its own circumstances (f). But very little evidence is sufficient to make him liable for the nominal value of the shares, and if during the time the shares for which he is called upon to account were in his hands, any other shares were taken by him from the company, or allotted to applicants, this is *prima facie* evidence that the shares were worth their nominal value (g).

Directors
qualified out of
assets of a
company.

Another illustration of the same general principle is afforded by those cases in which a director has had shares allotted to him as a qualification, and has had them paid up out of money belonging to the company, and been compelled to refund the money so paid (h).

Contracts
between directors
and their
companies.

Indeed, it is not going too far to say that every director of a company is bound, when his personal interest conflicts with his duty to the shareholders, to perform his duty towards them at the sacrifice of his own interest; and a transaction in which a director, on behalf of the company, has, in fact, been dealing with himself as an individual, cannot stand if his interest conflicts with that of the company (i). This was solemnly decided in the House of Lords, where it was unanimously held, that a contract entered into between a firm of ironfounders for the supply of railway chairs to a company, one of the directors of which was a member of the firm, clearly could not be enforced against the company (k). This

(d) *McKay's case*, 2 Ch. D. 1; *Nant-y-Glo v. Grave*, 12 Ch. D. 738; and cases in next notes. The highest value is not charged as the measure of damages in *bona fide* transactions. *Hirsche v. Sims* [1894], A. C. 654.

(e) *Eden v. Ridsdales Railway Lamp Co.*, 23 Q. B. D. 368.

(f) *Shaw v. Holland* [1900], 2 Ch. 305, and *ante*, p. 513, where the value at the date of allotment was taken.

(g) *Bland's case* [1893], 2 Ch. 612; *Postage Stamp, &c., Co.* [1892], 8

Ch. 567; *Pearson's case*, 5 Ch. D. 336; *De Ruigne's case*, 5 Ch. D. 306; *Weston's case*, 10 Ch. D. 579.

(h) *Hay's case*, 10 Ch. 593. See, also, *Carling's case*, 1 Ch. D. 115. These cases will be noticed hereafter under the head Contributories.

(i) See *Seligman v. Prince & Co.* [1895], 2 Ch. 617.

(k) *Aberdeen Rail. Co. v. Blaikie, MacQ.* 461. See, also, *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116; *Murphy v. O'Shea*, 2 Jo. & Lat. 422. See *Foster v. The Oxford Rail. Co.*, 13 C. B. 200, *ante*, p. 450.

decision did not turn upon any Act of Parliament, but was based upon the general principles applied by courts of equity to trustees and agents in their dealings with those whose interests are committed to their charge. The same principles unfortunately were not formerly recognised at law to the same extent as in equity; and it was therefore to be regretted that the Companies Act, 1862, contained no provisions similar to those in the repealed Act 7 & 8 Vict. c. 110, making void contracts between companies and their own directors unless sanctioned by the shareholders (l). But since the Judicature Act this has probably ceased to be of any consequence.

Whether, however, this be so or not it is clearly settled that the directors of a company cannot, without its consent, make a profit at its expense in the course of business transactions with it or for it. This is shown by *Albion Steam and Iron Works Co. v. Martin* (m), already alluded to, and by *Imperial Mercantile Credit Association v. Coleman* (n). In that case a director of a financial company was authorised to do some business for it at a certain commission to be paid to the company. He in fact got a larger commission, and it was held that the company was entitled to it, although he had told the other directors that he had an interest in the transaction. He never, however, told them what his interest was; and it was held that in order to entitle himself to the commission he was bound to make a full disclosure of his interest (o).

A company can, however, by its constitution, allow directors to contract with it without disclosing their interest in such contracts, and without being responsible for profits derived therefrom. Thus in a recent case where the company's articles of association provided that a director should vacate his office if he was interested in any contract with the company, except contracts with another company or firm of which he

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Profits made by
transacting
business.

Imperial
Mercantile
Credit
Association
v. Coleman.

When allowed
by company's
regulations.

(l) See *ante*, p. 450. See, too, *City of London Electric Co. v. Mayor of London* [1901], 1 Ch. 602, which turned on a special Act. The assignment of a valid contract with a company to persons who may not contract with the company does not avoid the contract in the absence of

novation. See *ib.*

(m) 1 Ch. D. 580, *ante*, p. 507.

(n) L. R. 6 H. L. 189, reversing S. C. 6 Ch. 558.

(o) See, also, *Dunne v. English*, 18 Eq. 524; *Benson v. Heathorn*, 1 Y. & C. Ch. 326.

Bk. III. Chap. 2. was a member, without declaring the nature of his interest,
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— and that if he was interested in contracts of the excepted class he should be disqualified from voting, it was held, on the construction of the articles, that a director who was known to be a member of another company with whom the company of which he was a director was contracting, and who had not voted in respect of the contract, was entitled to retain the profits he derived therefrom, although he had other interests in the contract in addition to his interest as a member of the other company, and had not disclosed the nature of his interest (s).

Taking shares
and debentures
at a discount.

Directors may issue debentures of a company at a discount if they cannot issue them at par; and it has been held that if a director takes some of them himself at the same price as they are issued to other people, he cannot be compelled to pay their full value (t). The same rule will apply to taking shares at a discount in those cases in which an issue of shares at a discount is allowed by law (u).

Sales by
directors to the
company.

The position of promoters and others selling their own property without disclosing the fact has been already investigated (x). The company can always repudiate such a transaction unless it is too late so to do; but it seems that the company cannot retain the property sold and compel the vendors to account for the profit they have made by the transaction (y). If rescission is not sought and no profit is shown to have been made there will be nothing to account for (z). An instructive illustration of this principle is

Ambrose Lake,
&c., Company.

furnished by *In re Ambrose Lake Tin Copper Mining Co., Ex parte Taylor* and *Ex parte Moss* (a). There a cost book mining company was converted into a registered company. The mine was bought by the new company from the old company for more than it was worth, but was paid for in shares of the new company all of which were allotted to the

(s) *Costa Rica Railway Co. v. Forwood* [1901], 1 Ch. 746, affirming, [1900], 1 Ch. 756; and remarks of Lord Hatherley in *Imperial Mercantile Credit Association v. Coleman*, 6 Ch. p. 567; and *infra*, p. 531.

(t) *Campbell's case*, 4 Ch. D. 470.

(u) As to which, see *infra*, c. 3, § 1.

(x) *Ante*, pp. 501 *et seq.*

(y) *Ib.* and *Burland v. Earle*, Times, 11th November, 1901.

(z) *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652, *ante*, p. 502, was decided on this principle.

(a) 14 Ch. D. 390.

members of the old company. In effect what was paid by the new company was what it got from the old company, but divided in a different manner amongst its members. The directors of the new company were members of the old company, and two of them sold their shares in the new company and made a profit by the transaction. The new company was wound up, and the liquidator endeavoured to recover for the company the profit made by those two directors; but the money obtained by selling the shares was in no sense the money of the company, and the Court held that the company was not entitled to the profit made by their sale (b). If shares in the new company had been allotted to persons who were not vendors, i.e., if strangers had come in and the mine had been bought with their money, the case would have assumed a different aspect. But as it was the only remedy was for each purchaser of shares in the new company to sue his vendor for any misrepresentation he might have made (c).

This case may be usefully contrasted with another in which all the persons interested in a company committed that which was a fraud on those only who subsequently joined it. In *The Society of Practical Knowledge v. Abbott* (d), a corporation was created by charter with a capital of 20,000*l.* in four hundred 50*l.* shares which ought to have been paid for in cash. At the time of the granting of the charter, four persons only held shares, and they appropriated the whole of the shares equally amongst themselves, and debited themselves in the books of the company with the 20,000*l.* This sum they did not pay, but after spending, as they alleged, 16,000*l.* in taking and fitting up the Adelaide Gallery, they paid 4,000*l.* into a bank to the credit of the company. They then sold shares; each for his own benefit, and for what he could get. It was afterwards alleged that 8,000*l.* only, and not 16,000*l.*, had been expended for the purposes mentioned, and that in point

Case where all the members agree to divide shares between them to the detriment of the company.

Society of Practical Knowledge v. Abbott.

(b) *British Seamless Paper Box Co.*, 17 Ch. D. 467, was a similar case, only new shareholders afterwards came in.

(c) See 14 Ch. D. 399, *per* Cotton, L. J. The object of the whole transaction was to obtain shares in

the new company, and then sell them for more than they were worth.

(d) 2 Beav. 559. See, also, as to duties to future shareholders, cases cited, *ante*, p. 484.

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of fact, the four original members of the society had benefited themselves at the expense of the society to the extent of 8,000*l.* A bill was filed by the company against them for an account, in order to compel them to pay this amount; and a demurrer to the bill was overruled, although it was strongly urged on behalf of the defendants, that they were the company at the time when the acts complained of were done, and that they therefore had a right to do as they liked with the shares (e).

Presents to
directors.
George Newman
& Co.

The case of *George Newman & Co.* (f) is another case of the same kind. In that case a director of a so-called private company was obliged to refund presents which had been made to him out of the company's assets with the knowledge and assent of all the individual shareholders. The transaction was *ultra vires* the company; but even if *intra vires* it had not been sanctioned by any meeting of shareholders, although each had individually assented to it.

The duties of directors as trustees are by no means confined to an obligation to account to the company in respect of gains made by themselves at its expense.

Liability for
assets lost.

Directors are responsible for the loss of the company's assets if that loss is attributable to the employment by them of the assets in a manner and for purposes not warranted by the constitution of the company (g). Thus, in the *Land Credit Co. of Ireland v. Lord Fermoy* (h), the directors of a company who had improperly employed its funds in buying up its own shares were held liable to replace the funds so spent. So in *Grimes v. Harrison* (i) the directors of a building society were held liable to make good money of the society improperly expended in the purchase of land. So if directors are parties to a fraudulent transaction by which their company suffers loss,

Land Credit Co.
v. Lord Fermoy.

Grimes v.
Harrison.

(e) See, also, *Flitcroft's case*, 21 Ch. D. 519.

(f) [1895], 1 Ch. 674. As to presents to directors see *ante*, p. 433, note (p), and *infra*, pp. 540, 541.

(g) See *Cullerne v. London and Suburban Bldg. Socy.*, 25 Q.B.D. 485; and *Masonic, &c., Ass. Co. v. Sharpe*,

[1892], 1 Ch. 154, correcting *Pickering v. Stephenson*, 14 Eq. 342, and *Studdert v. Grosvenor*, 33 Ch. D. 528.

(h) 8 Eq. 7, and 5 Ch. 763. See, also, *Joint Stock Discount Co. v. Brown*, 8 Eq. 381. Compare *Turquand v. Marshall*, 4 Ch. 376.

(i) 26 Beav. 435.

they can be compelled to indemnify it against such loss (k). So if the directors improperly pay dividends, or interest on shares in the nature of dividends, out of capital (l). So directors will be held liable to repay money paid by them as a bonus to a promoter (m), or for commission improperly paid for placing the company's shares (n). So, too, if directors issue shares at a discount they will be liable for any loss thereby occasioned to the company (o).

The property of a company is so far regarded as in the nature of trust property that it can be recovered by the company from any person who has obtained it from the directors with notice that they were acting beyond their powers (p).

Although, generally speaking, directors have a wide discretion, and in the absence of proof of *mala fides*, it may be difficult to establish a case of culpable negligence or wilful default, yet

(k) See *Parker v. Lewis*, 8 Ch. 1035, where the Court held there was no loss caused by the fraudulent transaction.

(l) *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154; *National Funds Assurance Co.*, 10 Ch. D. 118; *Flitcroft's case*, 21 Ch. D. 519; *Denham & Co.*, 25 Ch. D. 752; *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Leeds Estate, &c., Co. v. Shepherd*, 36 Ch. D. 787; *Rance's case*, 6 Ch. 104; but see further on this subject, *infra*, pp. 601 *et seq.*

(m) *Ex parte Pelly*, 21 Ch. D. 492. See, also, *Englefield Colliery Co.*, 8 Ch. D. 388. As to presents by companies to their directors, see *ante*, note (f).

(n) *Faure Electric Accumulator Co.*, 40 Ch. D. 141; *Sydney & Wigpool, &c., Co. v. Bird*, 33 Ch. D. p. 95; compare *infra*, p. 525, note (m). As to when such payments are permissible, see *ante*, p. 43.

(o) *Hirsche v. Sims* [1894], A. C. 654.

(p) *Moxham v. Grant* [1900], 1 Q. B. 88, noticed *infra*, p. 542; *Ex parte Pelly*, 21 Ch. D. 492;

Bryson v. Warwick and Birmingham Rail. Co., 4 De G. M. & G. 711, and *Ernest v. Croysdill*, 2 De G. F. & J. 175, which require to be studied together. See the cases as to Building Societies repaying money improperly borrowed, *ante*, p. 287. See, also, *Hardy v. Metropolitan Land, &c., Co.*, 7 Ch. 427, reversing 12 Eq. 386. *Gray v. Lewis*, 8 Eq. 528, was decided on this principle, and, although reversed, 8 Ch. 1035 may be usefully referred to as illustrating the principle. The money there sought to be recovered never, in fact, belonged to the company. Its title was based on a sham and fraudulent transaction. In *Grimes v. Harrison*, 26 Beav. 435, the purchaser of the company's property was held to have had no notice of the directors' want of authority to sell it. But the defendants in such cases will not be restrained from parting with the property pending litigation, without sufficient evidence of the plaintiff's title, see *Bank of Turkey v. Ottoman Co.*, 2 Eq. 366; *Hagell v. Currie*, 2 Ch. 449.

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Actions to
recover property
of a company.

Culpable
negligence and
wilful default.

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Sect. 2.

Negligence in
taking security.

Evans v.
Coventry.

Not stopping
company.

Western Bank
of Scotland v.
Bairds.

Kingston
Cotton Mill Co.

if such a case be proved, and loss by the company attributable thereto be also proved, the directors will be liable to make good such loss (q). Thus, in *Evans v. Coventry*, it was sought to make the directors of a company responsible for monies of the company embezzled by its secretary, on the ground that the directors had neglected to obtain security for his good conduct, as they were required to do by the company's deed of settlement. The deed only required the directors to take such security as they thought proper, and no collusion or dishonesty was imputed to them, and under these circumstances the V.-C. Kindersley held that they were not liable to make good the monies in question (r). But on appeal, an inquiry on the subject was directed, with a view to make the directors responsible, if the result of the inquiry should prove adverse to them (s). Although the directors had a discretion as to what security they should require, they were culpably negligent in taking none at all (t).

Again, in *Western Bank of Scotland v. Bairds* (u), directors were held liable for losses sustained by reason of their neglect, in not causing the business of the company to be stopped, pursuant to a provision to that effect in its articles; and, although in a subsequent English case of a similar nature the decision was different, that case was decided on the ground that the shareholders had sanctioned the continuance of the business (x).

In a recent case, in which directors had for some years published incorrect balance-sheets, it was sought to recover from them damages alleged to have resulted from continuing the company's business on the footing that the balance-sheets were correct, the Court, however, held that such damage was too remote, and had not been proved to be the consequence of the misstatements in the balance sheets (y).

(q) See *Charitable Corp. v. Sutton*, 2 Atk. 400, and *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480.

(r) *Evans v. Coventry*, 2 Jur. N. S. 557.

(s) S. C., 8 De G. M. & G. 835. See clause 6 of the decree on appeal. Compare *Overend, Gurney, & Co. v. Gurney*, 4 Ch. 701, and *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, where there was no obligation

to take any security.

(t) See, also, *New Mashonaland Exploration Co.* [1892], 3 Ch. p. 586.

(u) Cited in 4 Ch. 381.

(x) *Turquand v. Marshall*, 4 Ch. 376, reversing 6 Eq. 112. See, also, *Lethbridge v. Adams*, 13 Eq. 547.

(y) *Kingston Cotton Mill Co.* [1896], 1 Ch. 331. There was no appeal on this point.

Directors cannot be made liable in damages for not calling meetings of shareholders even when it is their duty to do so, for it is impossible to say what would have been the result of the meeting if called (z).

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Not calling
meetings.

It is clearly established that directors who keep within the limits of their authority, and act *bonâ fide* to the best of their judgment (a), are not liable to make good to the company the losses which may result from their acts. Honest mistakes and errors of judgment made by directors when acting within their powers do not render them liable for losses thereby occasioned to the company. Nor are they in such cases bound to take more than a reasonable amount of care in the conduct of the company's business; the amount of care which they must take is difficult to define, but it has been said that in such cases they will not be liable for want of care unless it is, in a business sense, culpable or gross (b). This was the real *ratio decidendi* in the great case of *London Financial Association v. Kelk* (c), in which all the previous authorities on this subject will be found collected. In that case a company sought to make its directors responsible for large sums of money spent and lost in building the Alexandra Palace, and in obtaining shares in companies formed for carrying it on and for building on land about it. Such transactions were within the scope of the plaintiff company's memorandum of association; they were known to and approved by its shareholders; and the directors had acted honestly in the exercise of their powers; and although the consequences

No liability for
errors of
judgment.

London
Financial
Association
v. Kelk.

(z) *Lagunas Nitrate Co. v. Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. p. 437. See, too, *Walker v. Goe*, 4 H. & N. 350.

(a) See as to what amounts to acting *bonâ fide*, *Nat. Funds Ass. Co.*, 10 Ch. D. 118; *Oxford Benefit Build. Soc.*, 35 Ch. D. 502; *Faure Electric Accumulator Co.*, 40 Ch. D. 141, and cases in next note.

(b) *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales* [1899], 2 Ch. 629; *Lagunas*

Nitrate Co. v. Lagunas Syndicate [1899], 2 Ch. 392, and pp. 418, 419, 435; *Cullerne v. London & Suburban, &c., Building Socy.*, 25 Q. B. D. 485. If they exercise no judgment in the matter, see *New Mashonaland Exploration Co.* [1892], 3 Ch. 577. As to the expression "gross negligence," see *Giblin v. McMullen*, L. R. 2 P. C. p. 336. See, as to auditors, *infra*, pp. 617 *et seq.*

(c) 26 Ch. D. 107, see p. 144, noticed *ante*, p. 247.

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Directors who
have been
promoters.

Lagunas Nitrate
Co. v. Lagunas
Syndicate.

were disastrous they were held not responsible to make good the losses occasioned by them.

The same rule applies to directors of companies which have been formed with a board of directors consisting of the promoters or their nominees, for the purpose of purchasing the property of the promoters, if the position of the directors and their relation to the promoters is open and avowed. In these cases the position of the directors is a very difficult and delicate one, and their acts are open to misconstruction, nevertheless if they keep within the limits of their authority, and act honestly for the benefit of the company and with reasonable care, they will not be liable for the loss which may result from their acts. Thus in the *Lagunas Nitrate Co. v. Lagunas Syndicate* (d), the directors of the company were directors of the promoting syndicate, and were themselves promoters of the company, which was avowedly formed for the purpose of purchasing some property of the syndicate at a price fixed by the directors. The directors executed the purchase agreement in accordance with the articles of association. The agreement might have been avoided by the company owing to certain misrepresentations made in the course of its promotion for which the directors were responsible. The directors took no steps to rescind the agreement, nor did they disclose to the shareholders the facts which entitled the company to rescind it; on the contrary, they paid over the purchase money, completed the sale, and worked the property in the course of the company's business to such an extent that the company thereby lost its right of rescission. The majority of the Court of Appeal affirming Romer, J., nevertheless held that the directors were not liable for any loss occasioned to the company by what they had done; there was no charge of fraud against them, their position and relation to the syndicate was known to all concerned, and they had acted throughout within the limits of their authority and honestly in the interests of the company and without any culpable negligence.

(d) [1899], 2 Ch. 395, noticed ante, pp. 484, 486, on other points. See, also, *Hirsche v. Sims* [1894], A. C. p. 660, as to acts done by directors which promote their own interests as well as the company's.

So it has been held, that directors acting *bonâ fide* and within their powers, are not liable for a loss arising from a loan to a co-director who had died insolvent (e); nor for losses occasioned by purchasing a business which they knew to be insolvent at the time of purchase (f); nor for omitting to take mortgage securities to cover the amount of insolvency (g); nor for having made advances on what turns out to be insufficient security (h); nor for sums spent in attempting to realise their security (i); nor for losses arising from the act of their solicitor in handing over cheques entrusted to him for the purpose of making a loan on security, without taking the security (k); nor where the articles of association gave the company a lien, enforceable by sale, on the shares of any members indebted to it, and provided that no advance should be made to a director without security, were the directors liable for losses incurred by an advance to a director without other security than the lien upon his shares given by the articles of association, they having *bonâ fide* considered that security sufficient (l). Nor are directors acting *bonâ fide* and within their powers liable to refund to the company sums paid by way of commission and promotion money, to persons other than themselves, although such payments may have been made for very inadequate considerations (m).

Moreover, if judgment has been obtained against a company for a large sum of money, and the directors, instead of appealing, *bonâ fide* compromise the matter by paying less than the sum recovered, they cannot be compelled to refund to the

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Instances of
non-liability
for errors of
judgment.

In compromising
claims.

(e) *Turquand v. Marshall*, 4 Ch. 376. See p. 386.

(f) *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, affirming *Overend, Gurney, & Co. v. Gurney*, 4 Ch. 701.

(g) *Ib.* Compare *Evans v. Coventry*, 8 De G. M. & G. 835, cl. 6 of the decree on appeal.

(h) *Sheffield, &c., Building Society v. Aislewood*, 44 Ch. D. 412.

(i) *Ib.* But *secus* as to some of the monies of which the expenditure was held to be *ultra vires*.

(k) *New Mashonaland Exploration Co.* [1892], 3 Ch. 577.

(l) *National Bank of Wales* [1899], 2 Ch. 629, p. 675, affirmed *sub nom. Dovey v. Cory* [1901], A. C. 477. That such a lien constitutes a security, see *Everitt v. Automatic Weighing Co.* [1892], 3 Ch. 506, and *General Exchange Bank*, 6 Ch. p. 821.

(m) *General Exchange Bank v. Horner*, 9 Eq. 480. Compare *ante*, p. 521, notes (m), (n). As to payments by way of commission for underwriting shares, see *ante*, p. 43.

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Trusting to
others.

Dovey v. Cory.

company what they so pay, although the judgment against the company may have been erroneous (n).

A director, who is acting honestly himself, is entitled to trust the other officers or servants of the company to do their duty honestly, if he has no reason to suspect them. This was the basis of the decision in the important case of *Dovey v. Cory* (o). In that case a liquidator sought to make a director named Cory liable for the improper payment of dividends. Dividends had been paid when the true condition of the company's affairs did not in a business sense warrant their payment. The managing director and the general manager had for years fraudulently concealed from Cory and the other directors facts as to the value of outstanding debts and other matters, to which it was their duty to have called the attention of the board, but which might have been discovered by the directors by a careful examination and comparison of the contents of numerous documents brought to the board-room; they had also suppressed letters from the auditors calling the attention of the directors to the provisions made for bad debts and other matters which required investigation. The balance-sheets laid before the shareholders by the directors falsely represented the bank to be flourishing, and the directors' report falsely stated that proper provision had been made for bad debts. Cory, however, had himself acted honestly, and believed the balance-sheets and reports to be true, and had no reason to suspect the honesty or competence of the managing director or the general manager; he was himself deceived by them. Under these circumstances, the House of Lords, affirming the Court of Appeal, held that Cory had not placed undue trust in the managing director or the general manager, or been culpably negligent in the performance of his duties by omitting to examine the documents in the board room or the entries in the company's books, and that consequently he was not liable

(n) See *Parker v. Lewis*, 8 Ch. 1035, and the remarks of Jessel, M. R., in *Forrest of Dean Coal Mining Co.*, 10 Ch. D. 450; and *Bath's case*, 8 Ch. D. 334.

(o) *Dovey v. Cory* [1891], A. C. 477, affirming *National Bank of Wales*

[1899], 2 Ch. 624. See, also, *Denham & Co.*, 25 Ch. D. 752. As to trusting the secretary to check transfers of shares, *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833. As to auditors, see *infra*, pp. 617 *et seq.*

to make good the money which had been improperly paid away in dividends on the basis of the false balance-sheets and reports. Bk. III. Chap. 2.
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At the same time directors must attend to their duties and not place undue reliance on the other servants of the company. Thus in *Leeds Estate Co. v. Shepherd (p)*, directors who had paid dividends out of capital, relying on the balance-sheets prepared by the manager and certified by the auditor, were held liable to make good the money so paid away; in this case the directors had never exercised any judgment in reference to the accounts, which were not even made out in accordance with the articles of association. Trusting to
others.

Leeds Estate Co.
v. Shepherd.

The liability of a director for the misapplication by him of the money of the company closely resembles the liability of a trustee for a breach of trust, and is indeed often designated as such. The liability was not barred by the Statute of Limitations (q), though now the provisions of the Trustee Act, 1888, will usually apply except in cases of fraud (qq); it is not terminated by death (r); nor by bankruptcy (s). Liability as for
breach of trust.

In *Evans v. Coventry (t)*, directors were charged with interest at 4l. per cent. on the money of the company improperly applied by them in paying themselves salaries, in paying dividends out of capital, and in buying up shares; and in other cases when they have been charged with assets of the company which they have misapplied, or with profits made by themselves, to which the company is entitled, they have usually been charged with interest at 4 per cent. (u), but Interest charged
against directors.

Evans v.
Coventry.

(p) 36 Ch. D. 787.

(q) *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154; *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Flitcroft's case*, 21 ib. 519, see p. 537. Compare *Metropolitan Bank v. Heiron*, 5 Ex. D. 319, an action to recover a bribe, but that is not an action to recover the company's money, see *Lister v. Stubbs*, 45 Ch. D. 1, and *ante*, p. 514, note (y).

(qq) 51 & 52 Vict. c. 59, § 8; *Lands Allotment Co.* [1894], 1 Ch. 616; *National Bank of Wales* [1899], 2 Ch. p. 663; there was no appeal

on this point, see *Dovey v. Cory* [1901], A. C. p. 489. The Act does not bar a claim for dividends improperly paid and received by the director himself. As to staleness of the demand, see [1892], 1 Ch., pp. 167, 170, 172.

(r) *Ramskill v. Edwards*, 31 Ch. D. 100; *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154.

(s) *Ramskill v. Edwards*, 31 Ch. D. 100, and see *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

(t) 8 De G. M. & G. 835.

(u) See *Masonic, &c., Ass. Co. v.*

Bk. III. Chap. 2. perhaps now the rate will be 3 per cent. (x) except in cases
Sect. 2. of fraud (y).

Liabilities of Co-Directors.

Liability of
directors for
acts of each
other.

A difficult question which arises with reference to the liability of directors is the extent to which each is liable for the acts of the other. The following appear to be the principles applicable to this subject:—

1. All those directors who are actually implicated in misapplying the company's money (even although they only sign cheques prepared by others), are jointly and severally liable for the losses arising therefrom (z): *e.g.*, where they have improperly paid money to promoters (a), preliminary expenses (b), or dividends out of capital (c). So where they have paid up shares of their own out of the monies of the company (d), and where they have allotted to each other, as fully paid up, shares which are not paid up (e).

2. Directors who really know of and sanction such misapplication are implicated in it within the meaning of this rule, although they do not actively take part in it (f). But a director who has merely been a party to a resolution authorising a certain course of practice which has led to a misapplication of the company's funds will not be liable for moneys misapplied

Sharpe [1892], 1 Ch. 154; *Joint Stock Discount Co. v. Brown*, 8 Eq. 407; *Parker v. McKenna*, 10 Ch. 123; *National Funds Assurance Co.*, 10 Ch. D. 118; *Flitcroft's case*, 21 Ch. D. 519; *Oxford Benefit Build. Soc.*, 35 Ch. D. 502; *Leeds Estate, &c., Co. v. Shepherd*, 36 Ch. D. 787; *Faure, &c., Co.*, 40 Ch. D. 141. Even 5 per cent. has been allowed. *Alexandra Palace Co.*, 21 Ch. D. 149; *Denham & Co.*, 25 Ch. D. 752; *Oxford Benefit Build. Soc.*, *ubi supra*.

(x) See *Barclay v. Andrews* [1899], 1 Ch. 674; *Olympia, Ltd.* [1898], 2 Ch. 153, but see next note.

(y) See the remarks of Lord Macnaghten in *Gluckstein v. Barnes* [1900], A. C. p. 255.

(z) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *Land Credit Co.*

v. Lord Fermoy, 8 Eq. 7, 5 Ch. 763; *Lands Allotment* [1894], 1 Ch. 616.

(a) *Ex parte Pelly*, 21 Ch. D. 492. And see *Faure, &c., Co.*, 40 Ch. D. 141, and the remarks of Lord Macnaghten in *Gluckstein v. Barnes* [1900], A. C. p. 255.

(b) *Englefield Colliery Co.*, 8 Ch. D. 388.

(c) *Leeds, &c., Co. v. Shepherd*, 36 Ch. D. 787; *Oxford Ben. Build. Soc.*, 35 ib. 502; *Flitcroft's case*, 21 ib. 519; *Nat. Funds Ass. Co.*, 10 ib. 118.

(d) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381.

(e) *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322.

(f) *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, and 5 Ch. 763, where the sub-committee were the persons more immediately to blame.

by other directors acting in accordance with the resolution if he has taken no part in such misapplication (g). Bk. III. Chap. 2.
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3. So are directors who know of an intended misapplication, but take no steps to prevent it beyond writing a letter of disapproval (h); but mere presence at a meeting where the minutes of the meeting sanctioning the misapplication are confirmed, is not alone sufficient to make a person liable, if the money has been already misapplied (i).

4. Where their liability is to account for moneys of the company improperly received by them, they are only severally liable for their own receipts, and are not jointly and severally liable for each other's receipts (k). But even in this case their liability is joint and several if there has been a joint receipt by them all, and then a division amongst themselves of what they have all received; or if they have all been implicated in some joint breach of trust resulting in profit to them all (l).

5. It has been decided that a director who is not cognisant of a breach of trust committed by his co-directors, and who takes no part in it, is not liable for it (m). This point, however, involves the question, whether a director is not bound to make himself acquainted with what his co-directors are doing, and to take such steps as may be in his power to prevent them from doing wrong. On this question opinions differ, and it can scarcely be considered as settled (n). But an omission to attend meetings of the directors is not the same as the neglect of the duties which ought to be performed at those

(g) *Cullerne v. London & Suburban, &c., Bldg. Socy.*, 25 Q. B. D. 485.

(h) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381, and see *Ramskill v. Edwards*, 31 Ch. D. 100.

(i) *Lands Allotment Co.* [1894], 1 Ch. 616. Compare the difference in this case between the positions of Theobald and of Brock, p. 635.

(k) *Parker v. McKenna*, 10 Ch. 96; *General Exchange Bank v. Horner*, 9 Eq. 480.

(l) *Oxford Benefit Build. Socy.*, 35 Ch. D. 502; *Carriage Co-operative*

Supply Assoc., 27 Ch. D. 322, and per Lord Macnaghten, *Gluckstein v. Barnes* [1900], A. C. p. 255, ante, p. 495, and per Rigby, L.J., in *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. p. 461.

(m) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *Ashurst v. Mason*, 20 Eq. 225; and *Marquis of Bute's case* [1892], 2 Ch. 100.

(n) Compare the judgment of the M. R. in the *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, with the last cases, and see *Turquand v. Marshall*, 4 Ch. 385.

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meetings (o). Mere constructive notice is not enough to impose liability (p). Moreover, if (as often happens) the constitution or course of business of the company is such as to justify a director in leaving certain matters to his co-directors, or some of them, he is justified in trusting them with such matters, and is not responsible for breaches of trust committed by them and concealed from him (q). But in other cases his irresponsibility is by no means so clear (r).

6. Nor is a director liable for breaches of trust committed by his co-directors before he became a director (s). In this case the new director's liability, if any, can only be for the loss sustained by the company by reason of his omission to make known what he has discovered, and to compel the real delinquents to make good their breach of trust; and it has been decided that an incoming director is not liable for such omissions (s).

7. Nor is a director liable for breaches of trust committed by his co-directors after he has resigned his office, and his resignation has been accepted by the directors, in accordance with the regulations of the company. Even if his resignation is unknown to the company, and his name to his knowledge appears upon a report laid before the company and recommending a misapplication of the company's funds (e.g., the improper payment of a dividend), this is not alone sufficient to render him liable for the misapplication (t).

Powers of
directors treated
as trusts.

Gilbert's case.

That powers reposed in directors are regarded as being in the nature of trusts, is clearly shown by *Gilbert's case* (u),

(o) *Marquis of Bute's case* [1892], 2 Ch. 100.

(p) *Hallmark's case*, 9 Ch. D. 329, and see the next note.

(q) *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales* [1899], 2 Ch. 624, noticed *ante*, p. 526; *Denham & Co.*, 25 Ch. D. 752; *Land Credit Co. v. Lord Fermoy*, 5 Ch. 763, reversing on this point, S. C. 8 Eq. 7. As to auditors, see *infra*, pp. 617 *et seq.* See, too, *Marquis of Bute's case* [1892], 2 Ch. 100, where the President of a Savings Bank for years never attended to its business.

(r) See *Leeds Estate, &c., Co. v. Shepherd*, 36 Ch. D. 787.

(s) *Forest of Dean Coal Mining Co.*, 10 Ch. D. 450. See, too, *Lands Allotment Co.* [1894], 1 Ch. p. 635; *Ashurst v. Mason*, 20 Eq. 225; *Turquand v. Marshall*, 4 Ch. 385; *Evans v. Coventry*, 8 De G. M. & G. 835, decree cl. 2; but observe the Scotch cases *contra* there cited. And see *Jackson v. Munster Bank*, 15 Ir. L. R. 356.

(t) *National Bank of Wales* [1899], 2 Ch. p. 667.

(u) 5 Ch. 559. See, also, *Sykes' case*, 13 Eq. 255 as to paying calls

in which it was held that a director could not exercise his power of making calls for his own benefit and without regard to the interests of the company: in that case a call was postponed in order to enable a director to transfer his shares, and a transfer by him in the interval was held invalid. Again, in *Alexander v. Automatic Telephone Co.* (x) it was held to be a breach of duty for directors to require applicants for shares to make payments on application and allotment, and at the same time to issue to themselves the shares, for which they had subscribed the memorandum, without requiring any such payments to be made, and without disclosing the fact to the other shareholders. There are other cases which show that directors have no right to favour one set of shareholders more than another (y); and that powers of accepting surrenders of shares and of forfeiting shares (z), as also powers of approving transfers of shares (a), and of paying preliminary expenses (b), must be exercised *bonâ fide* for the purposes for which they are conferred.

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*Alexander v.
Automatic
Telephone Co.*

Before leaving the subject of the liability of directors to make good assets of the company improperly lost or parted with, or to account for profits made by them at the expense of the company, it is material to consider whether the shareholders have acquiesced in what has been done or not (c). Cases indeed may occur where their acquiescence is immaterial, but this is only where the company is incorporated and its funds have been applied in a manner which is *ultra vires* (d). In other cases the acquiescence of the shareholders affords a complete defence to the directors as against the shareholders

Effect of
acquiescence.

in advance, and then taking them back for fees. And compare *Poole Jackson and Whyte's case*, 9 Ch. D. 322.

(x) [1900], 2 Ch. 56, reversing *ib.* [1899], 2 Ch. 302. See now Companies Act, 1900, § 6 (1) (b).

(y) *Richardson v. Larpent*, 2 Y. & C. C. 507; *Harris v. The North Devon Rail. Co.*, 20 Beav. 384.

(z) *Infra*, cc. 5 & 6.

(a) *Bennett's case*, 5 D. M. & G. 284, p. 297; *Gresham Life Assurance Society*, 8 Ch. 446; *Moffatt v. Farqu-*

har, 7 Ch. D. 591; *Faure, &c., Co.*, 40 Ch. D. 141.

(b) *Englefield Colliery Co.*, 8 Ch. D. 388.

(c) See *De Bussche v. Alt*, 8 Ch. D. 286, at pp. 312 *et seq.*, as to what amounts to acquiescence as between principal and agent.

(d) See *ante*, pp. 231 *et seq.* As to a defence based on the equitable rule against stale demands in such cases, see *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154, and *infra*, c. 9, § 3.

Bk. III. Chap. 2. or the company: *e.g.*, where it is attempted to make them
 Sect. 2. — refund dividends improperly paid to the shareholders of an
 unincorporated company (*e*); or to make good losses sustained
 by the company after its business ought by the articles to
 have been stopped, but which the shareholders, knowing the
 facts, allowed to be continued (*f*).

Sanction by
 other directors.

Again, where a director has made a profit at the expense of
 the company, and this circumstance is known to the other
 directors, and they, acting *bonâ fide*, sanction it, having power
 so to do, the shareholders and the company will be bound by
 their sanction (*g*); they will not be so bound if the other directors
 are themselves implicated in the breach of duty (*h*). But as
 will be seen hereafter, when treating of winding up, a liquidator
 may impeach transactions on behalf of creditors which neither
 the company nor the shareholders can impeach themselves (*i*).

Indemnity.

The right of directors as trustees to be indemnified by the
 company against expenses and liabilities incurred by them in
 the exercise of their powers, will be alluded to in the next
 section. But it may be properly observed here that directors
 may be entitled to contribution and indemnity amongst them-
 selves in respect of a demand against them on the part of the
 company. Thus, where shares in a company were purchased
 and transferred into the name of a director as trustee for the
 company, pursuant to a resolution of the board which was not
 binding on the company, it was held that he was entitled to
 be indemnified by the other members of the board who had
 concurred in the transaction against the claims made on him
 by the company (*k*). Again, in *Ramskill v. Edwards* (*l*), a
 director who had been compelled to make good money of a

Contribution
 inter se.

Ramskill v.
 Edwards.

(*e*) *Turquand v. Marshall*, 4 Ch.
 376.

(*f*) *Ib.* See, also, *ante*, p. 522.

(*g*) *Imperial Mercantile Credit
 Assoc. v. Coleman*, 6 Ch. 558, re-
 versed, L. R. 6 H. L. 189, but
 only on the ground that the other
 directors were not sufficiently in-
 formed of the facts; see, too, *ante*,
 pp. 517, 518.

(*h*) *Lagunas Nitrate Co. v. Lagu-*

nas Syndicate [1899], 2 Ch. 392,
 and *ante*, p. 484.

(*i*) *National Funds Ass. Co.*, 10
 Ch. D. 118.

(*k*) See *Ashurst v. Mason*, 20 Eq.
 225, and *Ashurst v. Fowler*, *ib.* A
 director who was only present when
 the transfer was formally approved
 was held not liable. And compare
 the next case.

(*l*) 31 Ch. D. 100.

company which had been advanced on an improper security sued his co-directors for contribution; he was held entitled to relief against those directors who had joined in the misapplication and against the estates of such of them as were dead; but not as against one of them who had merely confirmed what had previously been done (*m*). The maxim that there is no contribution amongst wrong-doers is seldom applicable to this class of case; but if all parties have been guilty of actual fraud or of a wilful breach of the law, no relief will be obtainable by some against the others in respect of their fraudulent or illegal transactions (*n*).

As to the right to contribution and indemnity in respect of a liability incurred under the Directors Liability Act, 1890, see *ante*, pp. 122 *et seq.*

When a director is entitled to contribution from his co-directors, time will not begin to run for the purposes of the Statute of Limitations, as between himself and his co-directors, until his liability has been established (*o*).

SECTION III.—OF THE RIGHT OF DIRECTORS AND OTHERS TO INDEMNITY.

The right of partners to contribution in respect of their liabilities and losses will be found investigated in the volume on Partnership (*p*). Wherever there is community of profit and loss there must be a right to contribution in respect of those transactions the profits or losses of which have to be shared. Consequently, if a member of a company is compelled to pay more than his share of a debt of the company, he is entitled to contribution from the other members. In some cases this right is expressly conferred by statute; in others it rests on express agreement; but the right exists independently of express enactment or agreement, although it of course may

(*m*) See the last note but one.

(*n*) See Partn., 380 *et seq.*, and the remarks of Lord Macnaghten in *Gluckstein v. Barnes* [1900], A. C. p. 255.

(*o*) See *Robinson v. Hurkin*

[1896], 2 Ch. 415, a case between co-trustees, and *Wolmershausen v. Gullick* [1893], 2 Ch. 514, a case between co-sureties.

(*p*) Partn., 370 *et seq.*

Bk. III. Chap. 2. be modified or even be excluded in particular cases by special
 Sect. 3. enactment or agreement.

Right of
 shareholders to
 be indemnified
 against
 judgments.

The right of a public officer of a banking company to be indemnified by the members of the company against judgments obtained against himself is recognised by statute (*q*); and the right of each individual shareholder, against whom execution may have issued for a debt of the company, to indemnity from the company, or to contribution from his co-shareholders, is also placed beyond a doubt by legislative enactment (*r*), except in the case of companies governed by the Letters Patent Act, 7 Wm. 4 & 1 Vict. c. 78, which is silent upon this point. This Act provides for limited liability, but does not enact that if one member of a company governed by it pays more than his share of a debt of the company, he is to be reimbursed by the company or the other shareholders; but his right to such indemnity or contribution is nowhere taken away, and may therefore be assumed to exist by virtue of general principles not touched by the statute.

In registered companies this particular question cannot arise, as execution cannot issue against individual shareholders on judgments obtained against such companies.

The rights of members of companies to contribution seldom arise until the companies are being wound up: and for further information on this head the reader is referred to Book IV. The rights of directors, however, require special notice, and may be conveniently examined in the present chapter.

Right of
 directors to
 contribution
 and indemnity.

Directors of a company are both members and also agents and trustees. As members, they are entitled to contribution in respect of such debts and liabilities of the company as they may be compellable or have been compelled to pay in that character; and as agents and trustees they are entitled to be indemnified by the company against all losses and expenses *bonâ fide* sustained and incurred by them in the exercise of the trust reposed in them. But if directors exceed their authority, and thereby incur loss, such loss must be borne by them and not by the company, unless the company ratifies what they

(*q*) 7 Geo. 4, c. 46, § 14.

pealed Acts, 7 & 8 Vict. c. 110, § 67,

(*r*) 7 Geo. 4, c. 46, § 14; 8 & 9
 Vict. c. 16, § 37. See, also, the re-

and 7 & 8 Vict. c. 113, § 14.

have done. But even in this case one director may be entitled to contribution from his co-directors as has been already seen (s). Moreover, if directors have been made liable to replace money improperly distributed amongst the shareholders with their assent, given with full knowledge of the facts which made the distribution improper, they can recover from each shareholder the amount he has himself received (t).

The cases illustrating these general statements will be examined presently, but before proceeding to notice them it is requisite to allude to certain decisions which tend to show that where directors of a company acting *bonâ fide* and to the best of their judgment, advance money in order to carry on the business of the company, and spend the money for that purpose, they are entitled to be reimbursed by the company; although they had no authority to borrow money, and could not have rendered the company liable to third persons for money lent on the credit of the company.

Upon this subject the case of the *German Mining Company* (u) is the leading authority. It was there decided that directors who had no power to borrow money on the credit of the company, but who nevertheless did borrow money, and themselves advance money, and *bonâ fide* apply the whole for the benefit of the company, were entitled, having themselves repaid the money borrowed, to be reimbursed by the shareholders the whole amount borrowed and advanced. The circumstances of this case were somewhat peculiar. The partnership was a mining partnership; it was absolutely necessary to work the mines in order to preserve them from rapid deterioration and destruction; the directors had ostensible power not only to carry on the mines, but also to carry them on on credit; the money borrowed and advanced was wholly applied in paying miners' wages, and other expenses necessarily incurred in carrying on the works, and so preserving the mines; and the shareholders were kept informed of what was being done. The money borrowed and advanced was in fact applied in discharging debts for which the company was or

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Directors acting
bonâ fide, but
beyond their
authority.

German Mining
Company's case.

(s) See *ante*, pp. 532, 533.

Q. B. 88, and *infra*, p. 542.

(t) *Mozham v. Grant* [1899],

(u) *Ex parte Chippendale*, 4 De G.

1 Q. B. 480, affirmed [1900], 1 M. & G. 19.

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would have been legally responsible; and although it by no means necessarily followed that those debts were not incurred improperly as between the directors and the shareholders, yet the full information which the shareholders had of what was being done, precluded them from saying that the debts were improperly incurred. Although, therefore, the company was not liable at law to repay the money borrowed, the mode in which that money was applied, coupled with the acquiescence of the shareholders in the course pursued by the directors, entitled them to be reimbursed the money they had advanced.

Observations on
the foregoing
cases.

This case paved the way for others which have gone beyond it (x). The decisions referred to are apparently based upon the ground that directors do not exceed the limits of their trust by borrowing and advancing money *bonâ fide* for the purposes of the company, although the borrowing may have been an excess of authority. But it is difficult to see how that which, as between the directors and the shareholders, is a clear excess of authority, can as between the same persons be deemed warranted by any trust. Nor is it easy to assent to the doctrine that where shareholders have anxiously limited the powers of directors with respect to raising capital and borrowing money, there is no breach of trust on the part of directors who persist in carrying on the business of the company on credit, when the capital of the company has been expended, and its borrowing powers have been exhausted.

These decisions must be contrasted with others (y) which

(x) *Norwich Yarn Company's case*, *Ex parte Bignold*, 22 Beav. 143; *Baker's case*, 1 Dr. & Sm. 55; *Troup's case*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225; *Lovndes v. The Garnett & Moseley Mining Co.*, 3 N. R. 601; see also *British Provident Socy. v. Norton*, 3 N. R. 147, and 9 Jur. N. S. 1308. It is very difficult to reconcile the company's deed in *The Norwich Yarn Company's case* with the notion that the directors had, as between themselves and the shareholders, power to borrow in any other way than that pointed

out in the deed; and yet if this were not so, the decision ought to have been against the directors, as in the case of *The Worcester Corn Exchange*, 3 De G. M. & G. 180, and *Selwyn v. Harrison*, 2 J. & H. 334.

(y) *Worcester Corn Exchange Company's case*, 3 De G. M. & G. 180, and *Ex parte Cropper*, 1 De G. M. & G. 147. These cases and those in the last note will be found discussed at length in the earlier editions of this work. See 5th ed., pp. 381-385.

are strictly in conformity with the sensible rule that agents Bk. III. Chap. 2. Sect. 3. are not entitled to any indemnity from their principals in respect of unauthorised expenditure; and in the first edition of this work the writer ventured to express a hope, that this rule, so essential to the protection of shareholders against directors, would not be frittered away; and that the principle of *The German Mining Company's case* would not be extended. That hope has been partially realised, for all attempts to extend that principle have failed, and its practical application is now confined to cases where the money has been applied in discharging debts for which the company was liable, or for carrying on the legitimate business of the company (z). Even when thus restricted, however, it must be borne in mind that debts for which a company is liable may as between the directors and the shareholders have been improperly contracted by the directors; and in such a case the directors ought to indemnify the shareholders, and not the shareholders the directors.

Notwithstanding the length to which the courts have gone in the cases observed upon above, directors who borrow money without authority, and apply it to purposes not falling within the scope of the company's business, are not entitled to be reimbursed by the shareholders. This is well shown by the case of *The Kent Benefit Building Society* (a). There the managing committee of a benefit building society exceeded their powers by purchasing land, and by borrowing the money to pay for it. The repayment of the money was secured by a mortgage of the land purchased. The society was ordered to be wound up. The mortgage securities were realised for less than the amount due upon them, and the members of the committee had to make good the difference. They sought to

Limits of the principle above discussed.

1. Where money is raised for an unauthorised purpose.

Kent Benefit Building Society.

(z) See the cases in the next note, and *Ex parte Williamson*, 5 Ch. 309; *Cork and Youghal Rail. Co.*, 4 Ch. 748; *Hill's case*, 9 Eq. 605; *Davis' case*, 12 Eq. 516; *The Catholic Publishing Co.*, 10 Jur. N. S. 193; and *ante*, pp. 292 *et seq.*

(a) 1 Dr. & Sm. 417. See, also, *Cunliffe, Brooks & Co. v. Blackburn*

Building Soc., 9 App. Ca. 857, affirming 22 Ch. D. 61; *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 29 Ch. D. 902; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155; 36 Ch. D. 674; affirmed 10 App. Ca. 354; all noticed *ante*, pp. 284 *et seq.*, and 292 *et seq.*

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prove the amount paid by them as a debt against the society; but it was held that the society was not liable. The fact of the borrowing appears to have been brought to the notice of the society at a general meeting; but there was nothing to show that the acts of the committee had been sanctioned by all the members of the society; and to buy land was not within the scope of the objects of the society, and was altogether *ultra vires*.

2. Where the
right to
indemnity is
expressly
restricted.

Gillan v.
Morrison.

Again, the right of directors to indemnity, if expressly confined and limited, cannot be extended beyond the limit thus expressly set. The two following cases illustrate this.

In *Gillan v. Morrison* (b), a company was formed for purchasing land in Segovia, and establishing a colony there. It was agreed at a meeting of the directors and proposed shareholders, that an expedition should proceed to Segovia, to examine and report upon the land which it was proposed the company should purchase; that the expense of the expedition should not exceed 1,200*l.*; that the expense to that amount should be defrayed out of the shareholders' deposits, and that if the expense should exceed 1,200*l.*, the difference should be raised by a new issue of shares. Certain persons were appointed trustees to direct the fitting out of the expedition, to nominate the persons who were to conduct it, and to manage the fund supplied for defraying the expenses. The persons composing the expedition proceeded to Segovia, and arrived at the place where the lands in question were situate; and were then arrested and imprisoned. The object of the expedition was thus frustrated; the expenses incurred by its members greatly exceeded the fixed sum of 1,200*l.*; and an attempt was made on behalf of the trustees to compel the shareholders to make good the excess. But it was held that, as between the trustees and the shareholders, the liability of the latter was limited to 1,200*l.*, and that they were not bound to contribute more.

Selwyn v.
Harrison.

Again, in the case of *Selwyn v. Harrison* (c), the creditors of a firm executed a deed by which the business of the firm was placed in the hands of inspectors, and the creditors severally covenanted to indemnify the inspectors to a limited extent

(b) 1 De G. & S. 421.

(c) 2 J. & H. 334.

against the liabilities which they might incur in carrying on the business. It was held that the creditors were not bound, otherwise than by their covenants, to contribute to the payment of debts contracted by the inspectors in carrying on the business. The express covenant to indemnify the trustees to a definite amount, excluded any more extensive obligation to indemnify them which might otherwise have arisen.

The reader, however, will not fail to observe that in *The German Mining Company's case*, the shareholders had taken care to stipulate that their liability should not be unlimited (*d*).

It is scarcely necessary to remark that the shareholders in a limited liability company cannot be compelled to contribute more than the amount of their shares, either for the purpose of indemnifying directors or for any other purpose.

With respect to advances by directors to the company, although the duties of directors and the interest of creditors may very possibly conflict with each other, and it is always suspicious when a director claims to be a creditor of the company entrusted to his care, in respect of a matter of which the shareholders know nothing, yet, assuming the transaction to be *bonà fide* and the directors to have power to borrow the money, there is nothing to prevent a loan by one of themselves to the company (*e*). If a director has guaranteed a debt of the company, and stipulated with his co-directors for a security on the property of the company by way of indemnity, his co-directors may give him such a security (*f*).

Directors of companies are generally allowed compensation for their trouble by express agreement (*g*); but where there is

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Loans by
directors.

Allowances
to directors.

(*d*) This was also the case in *Murray's Executors' case*, 5 De G. M. & G. 750; *Teversham v. The Cameron's Coalbrook, &c., Co.*, 3 De G. & S. 296.

(*e*) *General Auction Co. v. Smith* [1891], 3 Ch. 432; *Campbell's case*, 4 Ch. D. 470. See, also, *Murray's Executors' case*, 5 De G. M. & G. 750; *Ex parte Sedgwick*, 2 Jur. N. S. 949. And as to companies under the Act of 1856, see *Bluck v. Mullalue*, 27 Beav. 398. It was otherwise under 7 & 8 Vict. c. 110, see *Baker's case*, 1 Dr. & Sm. 55;

(*f*) *Pyle Works* (No. 2) [1891], 1 Ch. 173.

(*g*) Where there is such an agreement they are entitled to their fees, although the company proves a failure, *Ex parte Johnson*, 27 L. J. Ch. 803. See *infra*, notes (*o*), (*p*), and (*q*).

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York and North
Midland Railway
Company v.
Hudson.

no such agreement they cannot, without the sanction of the shareholders, charge the company anything for their services (h), nor are they entitled to extra remuneration for extra work. In *The York and North Midland Railway Company v. Hudson* (i), the defendant contended that he was entitled to certain shares of the company by way of remuneration for the great advantages he had conferred upon it, and for which, as he alleged, the shares in question would be a meagre and inadequate return. But the Court held this contention to be wholly inadmissible, observing that:

“When Mr. Hudson accepted the office of chairman, he knew that the salary was not more than 1*l.* per week, and yet he was content to give his services on that footing. He might possibly have considered that the station and influence acquired in the position of chairman of the York and North Midland Railway was a remuneration for the time and labour bestowed by him, even if his services were not paid by any salary at all; but whether this were so or not, it is the duty of every man who accepts any situation, to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation in retaining for his own benefit sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value. If this principle were allowed, I know not what there would be to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services” (k).

A director does not lose his right to remuneration by reason of not having acquired his qualification (l), but what is due to

(h) *Dunston v. Imperial Gas Co.*, 3 B. & Ad. 125, where there was a resolution to pay them. See, too, *infra*, p. 541.

(i) 16 Beav. 485. See, too, *Evans v. Coventry*, 8 De G. M. & G. 835, *Oxford Benefit Build. Soc.*, 35 Ch. D. 502, and *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 787, where directors were made to refund, with interest, the difference between what they were entitled to by the company's

deed, and what they had voted themselves, and retained for their remuneration. See, too, *Barland v. Earle*, Times, 11th Nov., 1901.

(k) See, also, *Imperial Merc. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189, and *ante*, p. 439, and p. 443.

(l) *Salton v. New Berston Cycle Co.* [1899], 1 Ch. 775. As to the provisions in the Companies Act, 1900, see § 3, and *ante*, p. 467.

him in respect of his remuneration may be set off against what is due from him in respect of his qualification (*m*). If the directors are remunerated by a percentage on the net profits of the year, they will only be entitled to a percentage of the profits earned by the company as a going concern (*n*). Bk. III. Chap. 2.
Sect. 3.

If a limited company is being wound up, it has been held that fees due to its directors cannot be paid until the debts of the company have been satisfied (*o*), but this decision appears open to question, and does not apply if the directors' claim for remuneration is founded upon an agreement wholly (*p*), or in part (*q*) outside the company's articles of association. Recovery of
fees in a
winding up.

When a company is being wound up, it cannot make presents to its directors for past services at the expense of its creditors, or otherwise than at the expense of those who make the presents (*r*), though on a sale of its business it may provide for the payment of compensation to the directors for loss of office (*s*). A director who has received a present to which he is not entitled can be made to refund it (*t*). Presents to
directors in a
winding up.

If losses not properly chargeable to the company or the shareholders, without their consent, are charged to them in the accounts and reports in such an open and fair way as to enable them to see and understand what is done, and these accounts and reports are not objected to, but are, on the contrary, approved and adopted by the shareholders, it will be too late for them afterwards to dispute the propriety of what they may thus have sanctioned (*u*). Moreover, those shareholders who do not choose to attend meetings of which they have notice, cannot complain of Ratification by
shareholders.

(*m*) *Ib.*

(*n*) *Frames v. Bultfontein Mining Co.* [1891], 1 Ch. 140. See, also, *Ex parte Kemp* [1894], 3 Ch. 690. As to the apportionment of the remuneration and the waiver of remuneration, see *ante*, pp. 419, 420.

(*o*) *Ex parte Cannon*, 30 Ch. D. 629. Companies Act, 1862, § 38 (7).

(*p*) *Dale & Plant, Ltd.*, 43 Ch. D. 255.

(*q*) *Ex parte Beckwith* [1898], 1 Ch. 324. *Qu.*: if this case is

really distinguishable from *Ex parte Cannon*.

(*r*) See *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654.

(*s*) *Southall v. British Mutual, &c., Society*, 6 Ch. 614; *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 365.

(*t*) *George Newman & Co.* [1895], 1 Ch. 674, noticed *ante*, p. 520.

(*u*) *Ex parte Chippendale*, 4 De G. M. & G. 19, might perhaps have been properly decided on this ground alone.

Bk. III. Chap. 2. their ignorance of what they might have known had they
 Sect. 3. attended (x).

Refunding by
 shareholders.

Moxham v.
 Grant.

Where directors have misapplied moneys of a company by improperly distributing them among the shareholders, and have been afterwards compelled to repay such moneys, the question arises whether the directors can compel the shareholders to refund the amounts they have respectively received. It has now been decided that they can do so, if the distribution was made with the assent of the shareholders and the money was accepted by them with full knowledge of the source from which it came and of the facts which made the distribution *ultra vires*. In such a case the shareholders are in the position of persons who have received trust moneys knowing them to be trust moneys, and that the payment to them was a breach of trust. They are, therefore, themselves liable to repay what they have received, and consequently to indemnify the directors to this extent (y).

(x) See *ante*, p. 431, and *Turquand v. Marshall*, 4 Ch. 376; *Lane's case*, 1 De G. J. & Sm. 504. See, also, *Ex parte Bignold*, 22 Beav. p. 165.

(y) *Moxham v. Grant* [1900], 1 Q. B. 88, affirming [1899], 1 Q. B. 480. See, too, *Alexandra Palace Co.*, 21 Ch. D. 149, and *National*

Funds Assurance Co., 10 Ch. D. 118, where the directors' rights, if any, against the shareholders were reserved; *Wye Valley Rail. Co. v. Hawes*, 16 Ch. D. 489, where the Court refused to add the shareholders as third parties to an action against the directors.

CHAPTER III.

OF THE CAPITAL OF COMPANIES; OF CALLS; OF DIVIDENDS; AND
OF ACCOUNTS.SECTION I.—GENERAL OBSERVATIONS ON THE CAPITAL OF
COMPANIES.

THE word capital is used in many senses: we speak of Bk. III. Chap. 3.
Sect. 1. borrowed or loan capital; of share capital; of nominal capital; of paid-up capital; of unpaid-up capital; of issued and un-Capital. issued capital; of fixed capital; of floating capital. Again, capital is used by way of distinction from income, interest, dividends, and profits; and accounts are divided into capital accounts and income accounts. The idea underlying the various meanings of the word capital in connection with a company is that of money obtained or to be obtained for the purpose of commencing or extending a company's business as distinguished from money earned in carrying on its business. Money earned in carrying on the business may be treated as capital, or, in other words, may be capitalised, *i.e.*, it may be applied in paying off capital previously borrowed, or in replacing capital which has been lost or exhausted, or in some extension of business instead of being applied in defraying current expenses, or in being divided as profit.

In speaking of capital, it is of the first importance not to confound borrowed capital with share capital.

1. *Of borrowed or loan capital (a).*

A company's so-called borrowed capital or loan capital is Borrowed
capital. neither more nor less than a debt; it is money borrowed by a company on certain terms, and is repayable by the company according to the terms on which the money has been lent.

(a) As to stamps on loan capital, *ante*, p. 309.
see 62 & 63 Vict. c. 9, § 8, and

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Sect. 1.

The loan may be secured or unsecured—*i.e.*, the persons to whom the money is due may be entitled to a mortgage or charge on the company's property, or some definite part of it, or they may simply be entitled to be paid by the company out of its assets, without having any specific mortgage or charge upon them or any part of them (*b*).

The power of companies to borrow money has already been alluded to (*c*), and the observations there made are equally applicable to money borrowed as capital and to money borrowed for other purposes. The powers of companies to issue debentures, and the rights of debenture-holders have also been already noticed (*d*).

2. Of share capital (*e*).

Company not
a debtor to
capital.

Although accountants and business men frequently speak of a company being debtor to capital, the expression, though useful if properly understood, is not accurate: the capital, properly so called (*f*), of a company is not a debt of the company. The expression merely means that when it becomes necessary to ascertain the financial position of the company its capital must be brought into account, and this is done by treating the company as though it were a debtor to capital (*g*).

Capital of
companies.

The capital of a company—*i.e.*, the money intended to be contributed, or agreed to be contributed by its members for carrying out its objects—is one of the matters determined upon as soon as its formation is seriously undertaken.

(*b*) See *ante*, p. 300.

(*c*) *Ante*, pp. 284 *et seq.*

(*d*) *Ante*, pp. 299 *et seq.* and pp. 343 *et seq.*

Stamps.

(*e*) The nominal share capital of companies with liability limited by registration, letters patent or Act of Parliament, and of companies (*qu.*: with limited liability) whose capital is authorised by letters patent, Act of Parliament, order of council or a certificate of a government department or in any other manner, and any increase of the capital of companies registered with limited liability or any such authorised

increase of the capital of other companies (*qu.*: with limited liability) is liable to an *ad valorem* stamp of five shillings on the 100*l.* See, and consider Stamp Act, 1891, 54 & 55 Vict. c. 39, §§ 112 and 113, amended by 59 & 60 Vict. c. 28, § 12, and 62 & 63 Vict. c. 9, § 7. As to what is an increase of nominal capital, see *A.-G. v. Midland Ry. Co.* [1901], 1 Q. B. 170, affirming [1900], 2 Q. B. 353.

(*f*) As to so-called loan capital, see *ante*, p. 543.

(*g*) See *Lee v. Neuchatel Asphalt Co.*, 41 Ch. D. p. 23.

The sum fixed upon ought to be so large as to be sufficient to enable the company to carry on its business with success; but it ought not to be larger than is necessary for this purpose; for the greater the capital sunk in any undertaking, the less will be each subscriber's share of profit, unless, indeed, the profits increase with the capital sunk, a result not so often obtained as anticipated. The probable success of any company depends very much upon the capital intended to be embarked in its projected business; if that capital is inadequate, it will probably be wholly lost; whilst if it is more than is required, the profits per share will be unnecessarily diminished. Hence the amount of a company's capital is one of those things which, when fixed, cannot be varied without the consent of *all* who join the company, unless there is some special provision to the contrary in the statute by which a company is governed, or in its charter or deed of settlement (*h*). This is well illustrated by *Smith v. Goldsworthy* (*i*), where it was held that notwithstanding the very large powers which by a company's deed were conferred upon a general meeting of shareholders, such a meeting was not authorised in so far altering the constitution of the company as to convert its capital from 2,000,000*l.* divided into 20,000 shares of 100*l.* each, into a capital of 1,000,000*l.* divided into 20,000 shares of 50*l.* each. Upon the same principle a person who agrees to take shares in a company with a given capital, is *prima facie* not bound to take shares in a company with a different capital (*k*); but persons not unfrequently agree to take shares in companies the capital of which is not defined; and in such cases they are bound by their agreement, although the capital ultimately fixed upon may differ materially from that originally proposed (*l*).

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Sect. 1.

Varying the
amount of
capital.

Smith v.
Goldsworthy.

The capital of a company is usually divided into a definite number of equal parts or shares; and the value and amount of

Division of
capital into
shares.

(*h*) See the observations of Lord Bramwell in *Bouch v. Sproule*, 12 App. Ca. 405, as to leaving money in the business. & C. 632; *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davis*, 5 M & W. 2.

(*i*) 4 Q. B. 430. Compare *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540, noticed *infra*, p. 546. (*l*) See, for example, *Norman v. Mitchell*, 5 De G. M. & G. 648; *Nixon v. Brownlow*, 2 H. & N. 455, and 3 ib. 686.

(*k*) See *Bourne v. Freeth*, 9 B.

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Sect. 1.

Varying the
amount of
shares.

Ambergate Rail-
way Company v.
Mitchell.

Unissued
shares.

such parts are by no means matters of small importance to the subscribers or shareholders; for not only is a small share more marketable than a large one, but the extent to which a subscriber or shareholder is liable to contribute to the capital or debts of a company depends on the number and amount of his shares. When, therefore, the number and amount of the shares into which the capital of a company is to be considered as divided are once fixed, no change in these respects will as a rule be valid unless made under some statutory or other special power, or unless assented to by all the shareholders; and there are cases to this effect (*m*). However, in the *Ambergate, &c., Railway Company v. Mitchell* (*n*), a company was incorporated by a special Act, which enacted that the capital was to be divided into shares, and that for the purpose of voting, each sum of 25*l.* of the capital should be considered as representing one share. The shares were at first 25*l.* shares, but the company (*i.e.*, apparently the directors) afterwards reduced them to 20*l.* shares, and it was contended in an action for calls on a 20*l.* share, that the alteration in the number and value of the shares was invalid, and that the call was not recoverable. But it was held that there was nothing in the company's special Act which prevented the directors from making shares of less than 25*l.* each; that they were not bound to fix the amount of the shares once for all; and that, as to the voting, the alteration could not deprive any one of his rights, inasmuch as the only effect of it was, to give every holder of a 25*l.* share, one share and a quarter, instead of one share as before.

Unissued shares in a company belong to the company, and although they may be placed at the disposal of the directors, the directors must account to the company for whatever they may receive in respect of such shares (*o*). On the other hand, the shares held by a director are his separate

(*m*) See acc. *Feiling's case and others In re the Financial Corporation*, 2 Ch. 714; *Sewell's case*, 3 ib. 131; *Smith v. Goldsworthy*, 4 Q. B. 430; and *In re European Society Arbitration Acts*, 8 Ch. D. 679, at p. 703.

(*n*) 4 Ex. 540.

(*o*) *York and Midland Rail. Co. v. Hudson*, 16 Beav. 485. So all unpaid calls, see *Webb v. Whiffin*, L. R. 5 H. L. 711; *Morris' case*, 7 Ch. 200; and 8 Ch. 800.

property, and he is in no sense a trustee of them for the company (p). Bk. III. Chap. Sect. 1.

Persons who conspire to issue, as good, more shares than the authorised number, may be criminally prosecuted (q). Issuing too many shares.

It is not usual for the whole of the sum fixed upon as the capital of a company, to be paid up at once by the subscribers or shareholders. The capital, and the number and amount of the shares into which it is to be divided, having been determined upon, and such shares having been subscribed for, an instalment only of the money they represent is paid, and the rest of that money is left to be paid as occasion may require. Hence the distinction between *paid-up* and *nominal* capital. The former is the money which the company actually has or has had; the latter consists of the sum to which it is entitled by virtue of the contract entered into by its subscribers and shareholders, including the nominal value of any unissued shares (r). Nominal and paid-up capital.

A share, the whole nominal amount of which has been paid to the company is called a *paid-up* share. Whether a share can be effectually paid up otherwise than in money has been much discussed. The result of the decisions seems to be, that unless the contrary can be shown by reference to some statutory enactment, payment in money's worth, *e.g.*, in services rendered or goods supplied to the company, is equivalent to payment in money (s): whence it follows that paid-up shares can be issued in consideration of such services, &c. The abuse, however, of this rule led to the insertion in the Companies Act, 1867, of a provision to the effect that shares in companies registered under the Companies Act, 1862, must be paid up in cash unless some agreement in writing for payment otherwise is entered into and registered at or before the issue of the shares (t). But this section was the cause of great hardship to many innocent shareholders, who, by reason of the Paid-up shares.

(p) *Gilbert's case*, 5 Ch. 559; see, too, *Cawley & Co.*, 42 Ch. D. 209.

(q) See *R. v. Mott*, 2 Car. & P. 521.

(r) See *English Channel Steamship Co. v. Rolt*, 17 Ch. D. 715; and *Re Dronfield Coal Co.*, *ib.* p. 86, *per*

Jessel, M.R.

(s) See *Currie's case*, 3 De G. J. & Sm. 367; *Drummond's case*, 4 Ch. 772; *Pell's case*, 5 Ch. 11; *Schroder's case*, 11 Eq. 131, and *infra*, Bk. IV., c. 1, § 13, A. (5).

(t) See 30 & 31 Vict. c. 131, § 25.

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Sect. 1.

omission of the company to register a proper contract in accordance with its provisions, have been compelled to pay up the full amount of their shares in cash when they had already given full value for them in some other form. The section has now been repealed (*u*). This matter will be discussed when dealing with the statutory enactments relating to the capital of companies governed by the Companies Acts (*x*), and again when considering the liability of the holders of shares purporting to be fully paid to contribute to the assets of the company when it is being wound up (*y*).

Value of
consideration
when not cash.

When shares have been issued as fully paid for a valuable consideration other than cash, the Courts will not inquire into the value of the consideration unless the agreement under which the shares were issued is impeached for fraud or misrepresentation; the question of value is one to be decided between the parties themselves (*z*).

Shares issued
as paid up
without con-
sideration.

The issue of paid-up shares otherwise than for value is a breach of trust on the part of the directors (*a*); and the company and its creditors are entitled to have such shares treated as not paid up (*b*); unless they are in the hands of *bonâ fide* holders for value without notice of the facts (*c*); or, perhaps, unless they are in the hands of persons who, though they have notice themselves, derive their title through a *bonâ fide* holder for value without notice (*d*); or unless the company is

(*u*) Companies Act, 1900, § 33.

(*x*) *Infra*, pp. 556 and 568 *et seq.*

(*y*) Book IV. c. 1, § 13 A. (5).

(*z*) *Wragg, Limited* [1897], 1 Ch. 796, where the earlier cases, viz., *Pell's case*, 5 Ch. 11; *Forbes & Judd's case*, 5 Ch. 270; *Baglan Hall Colliery Co.*, 5 Ch. 346; *Jones's case*, 6 Ch. 48; *Maynard's case*, 9 Ch. 60; *Anderson's case*, 7 Ch. D. 75; and *Leeke's case*, 6 Ch. 479 (containing some dicta, 11 Eq. 100, p. 107, to the contrary), and *Chapman's case* [1895], 1 Ch. 771, are collected and examined.

(*a*) See *Hirsche v. Sims* [1894], A. C. 654, and *Webb v. Shropshire Rail. Co.* [1893], 3 Ch. 307.

(*b*) See *infra*, Bk. IV. c. 1, § 13, A. (5), Holders of paid-up shares.

(*c*) See *Guest v. Worcester Rail. Co.*, L. R. 4 C. P. 9; *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *British Farmers, &c., Cake Co.*, 7 Ch. D. 533; *affd. sub nom. Burkinshaw v. Nicolls*, 3 App. Ca. 1004; *Barrow's case*, 14 Ch. D. 432; *A. W. Hall & Co., Limited*, 37 Ch. D. 712. See further in Bk. IV. c. 1, § 13, A. (5).

(*d*) *Barrow's case*, 14 Ch. D. 432; followed in *Ex parte Sandys*, 42 Ch. D. 98; but see *London Celluloid Co.*, 39 Ch. D. 190, *contra*. See also *Whitworth's claim* [1901], 1 Ch. 115.

otherwise precluded from showing that they have not been paid up (e). Bk. III. Chap. 3.
Sect. 1.

Where the liability of the members of a company is limited by charter, statute, or registration, it is, to say the least, questionable whether it can lawfully issue paid-up shares at a discount, and exonerate the taker from liability to pay the difference between the price at which he takes them and their nominal value (f). Shares in companies governed by the Companies' Clauses Consolidation Act which are issued for the purpose of raising additional capital and original shares, (except, perhaps, those which are subscribed for (g)), and the fully paid-up stock of such companies (h), can be issued at a discount, with certain restrictions; but shares in companies formed and registered under the Companies Act, 1862(i), or under the Joint Stock Companies Act, 1856 (i), cannot be so issued. Issue at a
discount.

Unless the contrary is declared by statute, charter, or express contract, all shareholders are entitled to equal rights; and no class is entitled to any preference or priority over any other. Nor can a majority of shareholders deprive a minority of this right of equality (k), unless the constitution of the company permits it. Preference
shares.

(e) See *ante*, p. 82, and *infra*, Bk. IV. c. 1, § 13 A. (5).

(f) See *Hoole v. Gt. Western Rail. Co.*, 3 Ch. 262; *West Cornwall Rail. Co. v. Mowatt*, 12 Jur. 407; and as to cost-book companies, 32 & 33 Vict. c. 19, § 12.

(g) 26 & 27 Vict. c. 118, § 21 (amended by 38 & 39 Vict. c. 66); 30 & 31 Vict. c. 127, § 27; 32 & 33 Vict. c. 48, §§ 5—7; *Statham v. Brighton Marine, &c., Co.* [1899], 1 Ch. 199.

(h) *Webb v. Shropshire Rail. Co.* [1893], 3 Ch. 307.

(i) *Ooregum Gold Mining Co. v. Roper* [1892], A. C. 125; *Hirsche v. Sims* [1894], A. C. 654 (the case of a limited company registered in South Africa); *Almada and Tiritio Co.*, 38 Ch. D. 415; *Addlestone*

Linoleum Co., 37 Ch. D. 191, overruling *Ince Hall Rolling Mills Co.*, 23 Ch. D. 545, n., and *Plaskynaston Tube Co.*, 23 Ch. D. 542. Discount at a proper rate may be allowed on calls paid in advance, *Ex parte Farquahar* [1896], 2 Ch. 320. In *Ex parte Audain*, 42 Ch. Div. 1, an agreement to underwrite shares at 15 per cent. discount, was construed as an agreement to underwrite at a commission of 15 per cent., and was held valid. See now as to such commission, *ante*, p. 43.

(k) *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 514 and 521; and 4 De G. J. & Sm. 672; *Ashbury v. Watson*, 30 Ch. D. 376. See also *Guinness v. Land Corp. of Ireland*, 22 ib. 349, and *ante*, p. 444, note (d). Compare the cases in the next notes.

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Sect. 1.

Shares conferring on their holders preferential or additional rights not enjoyed by the holders of other shares are called *preference* shares. They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested. Companies governed by the Companies Act, 1862, can issue preference shares unless in any particular case the company's memorandum of association is inconsistent with their issue (l); the silence of the memorandum on the subject is not necessarily inconsistent with their issue. The Companies Acts do not require the rights of the members in this respect to be defined in the memorandum. The Acts allow these rights to be dealt with by the articles, and give the members power by special resolution to change these articles from time to time. If there is no express power to issue preference shares by the memorandum or articles of association in their original form, the articles may be altered to give the power (m), if it is not inconsistent with the memorandum of association (n.)

Kind of preference.

Preference shareholders are members, not creditors, of the company issuing the shares. The nature of the preferential rights which the holder of a preference share enjoys depends on the terms on which it is issued; for example, he may be entitled to some advantage in voting, or to be paid a dividend in priority to other shareholders, or to be paid his capital in priority to them in the event of a winding-up. It by no means follows that a right to priority to payment of dividend whilst a company carries on business involves a right to priority to payment of capital when business has ceased, and the assets of the company are being distributed amongst the shareholders. This subject will be adverted to here-

(l) In *Underwood v. London Music Hall, Limited* [1901], 2 Ch. 309, the memorandum was held to authorise such an issue; in *Ashbury v. Watson*, 30 Ch. D. 376, the memorandum was held to be inconsistent with such an issue.

(m) *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361; *British and American, &c., Corp. v. Couper* [1894],

A. C. 399, overruling *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 514 and 521, and 4 De G. J. and Sm. 672. See, too, when there is power under the original articles, *Bridgewater Nav. Co.*, 39 Ch. D. 1; *South Durham Brewery Co.*, 31 Ch. D. 261; *Harrison v. Mexican Rail. Co.*, 19 Eq. 358.

(n) As in *Ashbury v. Watson*, 30 Ch. D. 376.

after. See as to dividends, *infra*, p. 554, and 607 *et seq.*, Bk. III. Chap. 3. and as to distribution of assets, Bk. IV., c. 1, § 16. Sect. 1.

Preference shareholders cannot be deprived of their rights by the other shareholders; but if their rights are created subject to modification or revocation they may be modified or revoked accordingly (o).

In the absence of special provision to the contrary, after the capital originally agreed upon has been raised and expended, any shareholder in an unlimited company has a right to say, I will subscribe no more, and if the company cannot now be carried on at a profit, I insist upon its being dissolved (p). This right is the only security which a shareholder, whose liability is not limited, has against being made responsible for an unlimited amount of debts. It certainly sometimes happens that calls are made after the original capital has been paid up and expended; but in order that the shareholders may be liable to pay such calls, they must either have agreed to submit to them, or must have allowed their directors to go on and contract debts which at last have to be met by a general contribution. Effect of exhausting capital.

A company has no power to increase its capital, unless such power is expressly conferred upon it, or unless all the shareholders agree to subscribe or raise more than the sum originally determined upon (q); and if the capital of a company is fixed by its charter, letters patent, or special Act, and no power is given to increase it, such capital cannot be increased, even by the consent of all the members of the company. The distinction, however, between borrowing money and increasing capital, which was adverted to on a former occasion, must not be overlooked; for it does not follow that because a majority of the shareholders of a company cannot increase the capital of the company, they cannot lawfully and against the Increasing capital.

(o) *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287; *Direct Spanish Tel. Co.*, *ib.* 307, and other cases, *infra*, p. 558; and as to power to alter the articles of association in companies governed by the Companies Act, see *ante*, pp. 461 *et seq.*

(p) See *Electric Telegraph Co. of Ireland*, 22 Beav. 471; *Jennings v. Baddeley*, 3 K. & J. 78; and *infra*, p. 556, and Bk. IV. c. 1, § 4 (1).

(q) See the cases in the last note, and *Fisher v. Tayler*, 2 Ha. 218.

Bk. III. Chap. 3. will of the minority, borrow money on the credit of the company (r).
Sect. 1.

Increasing capital of cost-book mining companies.

To the rule that, in the absence of special powers, the capital of a company cannot be increased against the will of a single dissentient shareholder, there is, apparently, an exception in the case of cost-book mining companies. It is stated by Mr. Tapping, in his useful essay on the cost-book, that the capital of a cost-book mining company may be increased in pursuance of a resolution of a special general meeting (s). No authority is cited for this statement, but it certainly is the constant practice of cost-book companies, which have spent all their capital, to make further calls on their shareholders, and to proceed against them in the Stannary court (t) in case of non-payment. But it must not be overlooked that the capital of a true cost-book company is seldom if ever fixed beforehand (u), and that shareholders in cost-book mining companies have the power of relinquishing their shares if all calls upon them have been paid up; and that if they do not choose to avail themselves of this power, they may with propriety be treated as agreeing to go on, and to furnish more capital, should it be found necessary, for the purposes of the mine.

Statutory enactments relating to capital, &c.

Passing now to the various statutory enactments bearing upon the capital of companies, it may be observed, that there is no statutory provision relating to the capital of banking companies governed by 7 Geo. 4, c. 46, nor to that of companies governed by the Letters Patent Act of 7 Wm. 4 & 1 Vict. c. 73.

Companies governed by the 'Companies' Clauses Consolidation Act.

Capital of companies governed by 8 & 9 Vict. c. 16.

The capital of companies incorporated by special Act of Parliament is determined by such Act, and is divided into shares of the number and amount thereby prescribed (x).

(r) See *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123; and *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733, noticed *ante*, pp. 290 *et seq.*

(s) Tapping on the Cost-Book, p. 22.

(t) Now the County Courts of

Cornwall. See 59 & 60 Vict. c. 45, and the Lord Chancellor's Order under that Act of 16th Dec. 1896.

(u) See *ante*, pp. 132 *et seq.*

(x) See *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540, noticed *ante*, p. 546. As to stamps on the nominal capital, see *ante*, p. 544.

And by the Companies' Clauses Consolidation Act it is enacted, Bk. III. Chap. 3.
Sect. 1. that the subscribers shall pay the sums subscribed by them respectively, or such portions thereof as shall from time to time be called for by the company (*y*); and the company is empowered to make calls on the shareholders (*z*), and to enforce payment by action (*a*), and to forfeit the shares of defaulters (*b*). Subject to certain restrictions, shares and the fully paid up stock in these companies may be issued at a discount (*c*). The Act in question does not itself confer any power to borrow, but it contains important provisions relating to the borrowing of money by companies empowered to borrow by their special Acts (*d*), and enacts that money authorised to be borrowed may, unless it be otherwise provided by the special Act, be raised by the creation of new shares (*e*), which, with reference to the payment of calls, are to be on the same footing as original shares (*f*), and are to be offered to the existing shareholders if the old shares are at a premium (*g*). It is also declared, that it shall be lawful for the company to convert or consolidate shares wholly paid up into capital stock, to be divided amongst the shareholders according to their respective interests therein (*h*); and provision is made for registering the owners for the time being of such stock and for the transfer thereof, and for securing to the holders such rights as they would have enjoyed if their shares had not been converted into capital stock of the company (*i*). The Act authorises the directors to receive payment from any shareholder of the whole amount of his shares, and to pay him interest on the difference between such amount and the amount of calls actually made in respect of the same shares (*k*).

The company's moneys are to be applied first in payment of the costs and expenses incurred in obtaining the special

(*y*) 8 & 9 Vict. c. 16, § 21.

(*z*) *Ib.* § 22. See *infra*, p. 586.

(*a*) *Ib.* § 25.

(*b*) *Ib.* § 29. See *infra*, c. 6.

(*c*) See *ante*, p. 549.

(*d*) 8 & 9 Vict. c. 16, §§ 38 *et seq.*,
and *ante*, pp. 343 *et seq.*

(*e*) *Ib.* § 56.

(*f*) *Ib.* § 57.

(*g*) 8 & 9 Vict. c. 16, § 58. See
Pearson v. London and Croydon Rail.
Co., 14 Sim. 541; and *Campbell v.*
London and Brighton Rail. Co., 5 Ha.
519, as to the time within which a
shareholder must accept the offer.

(*h*) 8 & 9 Vict. c. 16, § 61.

(*i*) *Ib.* §§ 62-64.

(*k*) *Ib.* § 24.

Bk. III. Chap. 3. Act, and secondly in carrying out the objects of the company (l).
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26 & 27 Vict.
c. 118.

Preference
shareholders.

The Companies' Clauses Act, 1863 (m), contains some further important provisions relative to additional capital and debenture stock of companies governed by special Acts of Parliament (n). The Act in question does not confer any power to increase capital, or to issue preference shares, or to create debentures, but only regulates the mode of exercising such powers where they are conferred by the company's special Act. There is one provision, however, relating to the rights of preference shareholders which requires special notice. The provision in question (§ 14) is to the effect that preference shares or stock shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each year in priority to the ordinary shares and stock of the company; but if in any year there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company. Prior to the passing of this Act, it had been held that preference shareholders were entitled to have any deficiency of profit in one year made good out of the profits of a subsequent year, even although nothing might be left for the ordinary shareholders (o). The enactment altering this rule only extends, it is conceived, to preference shares issued under some special Act passed after July, 1863.

31 & 32 Vict.
c. 119.

The Regulation of Railways Act, 1868, empowers any

(l) *Ib.* § 65. See, also, 27 & 28 Vict. c. 121, §§ 3 *et seq.*, *ante*, p. 196.

(m) 26 & 27 Vict. c. 118; amended by 30 & 31 Vict. c. 127, and 32 & 33 Vict. c. 48.

(n) As to debenture stock, see *ante*, p. 346.

(o) See as to preference shares, *Webb v. Earle*, 20 Eq. 556; *Bangor and Port Madoc Slate Co.*, *ib.* 59; *Henry v. Great Northern Rail. Co.*, 1 De G. & J. 606, and 4 K. & J. 1; *Sturge v. Eastern Union Rail. Co.*, 7

De G. M. & G. 158; *Crawford v. North-Eastern Rail. Co.*, 3 K. & J. 723; *Stevens v. South Devon Rail. Co.*, 9 Ha. 313; *Mattheus v. Great Northern Rail. Co.*, 5 Jur. N. S. 284; *Coates v. Nottingham W. W. Co.*, 30 Beav. 86; *Corry v. Londonderry and Enniskillen Rail. Co.*, 29 Beav. 263; *Smith v. Cork and Bandon Rail. Co.*, Ir. L. R. 3 Eq. 356, and 5 *ib.* 65, where the preference shareholders established their right to many years' arrears.

railway company to which the Act applies (*p*) to divide its fully paid-up ordinary stock into two classes, viz., preferred stock and deferred stock under the conditions and subject to the provisions contained in the Act (*q*). Bk. III. Chap. 3.
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Companies governed by the Companies Act, 1862.

By the Stamp Act, 1891, as amended by the Finance Act, 1899 (*r*), the nominal capital of any company to be registered with limited liability is liable to an *ad valorem* stamp duty of five shillings per cent., and a statement of the amount of nominal capital and of any increase of capital must be sent to the Registrar of joint stock companies. Stamp.

The capital of a company formed under the Act of 1862, and limited by shares, must be specified in the memorandum of association (§ 8), and the capital of unlimited companies formed under the Act, and having a capital divided into shares, must be specified in the registered articles (§ 14). Capital of companies governed by 25 & 26 Vict. c. 89.

The number and amount of the shares into which the capital is divided must also appear in the memorandum or articles, as the case may be (§§ 8 and 14); and the shares must be numbered (§ 22); but the omission to number them will not prevent their holder from being a contributory in respect of them (*s*). Number and value of shares.

Shares in limited companies formed under this Act cannot be issued at a discount (*t*). Issue at a discount.

A company limited by guarantee may have a capital divided into shares, and formerly the amount of its share capital had to be stated in its articles of association (§§ 9 and 14); but no company limited by guarantee registered after the 31st December, 1900, can have its capital divided into shares unless its memorandum of association so provides and specifies the amount of its capital and the number of shares into which it is divided (Comp. Act, 1900, § 27) (*u*). The share capital of such a company formed before the 1st January, Companies limited by guarantee

(*p*) See 31 & 32 Vict. c. 119, § 2. 2 Q. B. 353.

(*q*) *Ib.* § 13.

(*r*) 54 & 55 Vict. c. 39, § 112, and 62 & 63 Vict. c. 9, § 7. As to what is an increase of nominal capital, see *A.-G. v. Midland Rail. Co.* [1901], 1 Q. B. 170, affirming *ib.* [1900],

(*s*) See *Ind's case*, 7 Ch. 485. See *ante*, p. 67, as to numbering shares.

(*t*) See *ante*, p. 549, note (*i*).

(*u*) As to what provisions in the memorandum or articles are equivalent to a provision for a capital

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1901, can apparently be increased or reduced by an alteration of its articles (Act of 1862, §§ 14 and 50); but in the case of a company registered on or after that date it is apprehended that such an alteration must be made in the same way as in the case of companies limited by shares (x).

Increase of
capital.

The original capital may be increased by the issue of new shares (§§ 12 and 50) (y); but notice of the increase must be given to the Registrar of joint-stock companies (§ 34).

An unlimited company when registering as a limited company may increase its capital by increasing the nominal amount of its shares, but no part of such increased capital can be called up except in the event of the company being wound up (z).

Reduction of
capital.

The capital of an unlimited company may apparently be reduced (see §§ 14 and 50) (a); but to reduce the capital of a company limited by shares was impossible as the Act originally stood (b). This, however, may now be done under the provisions of the Companies Acts, 1867 and 1877 (c), and, except in the case of shares which have not been taken or agreed to be taken, with the sanction of the Court (d); but not otherwise, *e.g.*, by buying up and cancelling shares (e). But, as will be

divided into shares, see Companies Act, 1900, § 27 (2). The section was apparently intended to prevent the formation of such companies as that in *Malleson v. General Syndicate* [1894], 3 Ch. 538.

(x) Companies Act, 1900, § 27 (1), but notice that § 12 of the Act of 1862, as to increase of capital, and § 9 of the Act of 1867, as to its reduction, are in terms applicable only to companies limited by shares. See, too, the Act of 1877, § 4.

(y) See *Campbell's case*, 9 Ch. 1, as to the necessary meetings. As to the stamp, see *ante*, p. 555.

(z) See the Companies Act, 1879 (42 & 43 Vict. c. 76).

(a) As to companies limited by guarantee, see *ante*, note (x).

(b) See § 12, and the cases of *Feiling and others*, 2 Ch. 714; *Sewell's case*, 3 Ch. 131. As to making good

lost capital, see *infra*, p. 600. Even a company which had power to reduce its capital lost it by being registered as a limited company, *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Ex. 35.

(c) 30 & 31 Vict. c. 131, §§ 9 *et seq.*; 40 & 41 Vict. c. 26. See, too, 43 Vict. c. 19 as to the power to return profits subject to being re-called up in reduction of paid-up capital, *infra*, p. 562.

(d) § 11. For the practice of the Court in these matters, see the Rules of 1868 in the Appendix and the cases cited in the following notes, and *The General Mining Co., Ir.* L. R. 6 Eq. 213.

(e) *British and American, &c., Corp. v. Couper* [1894], A. C. 399; *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Trevor v. Whitworth*, 12 App. Ca. 409; disapproving *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *Taylor v. Pilsen, &c., Light Co.*, 27

seen hereafter, inability to reduce capital does not prevent shares from being forfeited or surrendered in the usual way (*f*). A surrender of a portion of the company's property with a view to improving the remainder is not a reduction of its capital (*g*). — Bk. III. Chap. 3. Sect. 1.

These Acts and the orders of Court relating to the reduction of capital will be found in the appendix to the present treatise. By reference to them and to the decisions referred to below it will be seen that—

1. The reduction of capital must be authorised by the company's regulations as originally framed or as altered by special resolution. Where the articles require alteration they must be first altered by special resolution and then another special resolution must be passed reducing the capital (*h*). Reduction by special resolution,

2. Shares never taken up or agreed to be taken up by any person may be cancelled by a special resolution of the shareholders, and without any application to the Court (*i*). without sanction of Court.

3. In all other cases an order of the Court having jurisdiction to wind up the company is necessary in order to effect a reduction of capital (*k*). In the High Court the petition praying for such an order should be presented to one of the judges of the Chancery Division (*l*), or to the judge to whom the winding up business is assigned (*m*). with sanction of Court.

4. Capital may be reduced in any manner which is fair and equitable; the interests of minorities will be protected by the Court, and any scheme of reduction, which does not provide for the uniform treatment of shareholders whose rights are similar, will be most narrowly scrutinised by it (*n*), and the Court will Court may sanction any scheme of reduction which is fair.

Ch. D. 268, must also be considered as overruled on this point. See *Re Balgooley Distillery Co.*, 17 Ir. L. R. 239.

(*f*) *Eichbaum v. City of Chicago, &c., Limited* [1891], 3 Ch. 459; *Teasdale's case*, 9 Ch. 54. Compare the cases in the last note. See further Bk. III. cc. 5 and 6.

(*g*) *Thomson v. Trustees, Executors, &c., Corp.* [1895], 2 Ch. 454.

(*h*) *Patent Invert Sugar Co.*, 31 Ch. D. 166; *West India Co. and Pacific, &c., Co.*, 9 Ch. 11. Compare *Taylor v. Pilsen, &c., Light Co.*, 27 ib. 268. And see *ante*, p. 476.

(*i*) 40 & 41 Vict. c. 26, § 5.

(*k*) 30 & 31 Vict. c. 131, § 11, and Companies (Winding-up) Act, 1890, § 1, and *infra*, Bk. IV. c. 1, § 1.

(*l*) *Islington and General Electric Supply*, W. N. 1892, p. 81.

(*m*) *Ocean Queen Steamship Co.* [1893], 2 Ch. 666. The petition need not be intitled in the matter of the Companies Winding-up Act, 1890, *Aluminium Co.*, W. N. 1894, p. 6.

(*n*) *British and American, &c., Corp. v. Couper* [1894], A. C. 399, overruling *Denver Hotel Co.* [1893], 1 Ch. 495, as to the limits of the Court's jurisdiction. *Floating Dock Co. of St. Thomas* [1895], 1 Ch. 691, p. 698.

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not grant its sanction unless satisfied that the reduction will not work unjustly or inequitably (o). Thus, provided that the reduction is fair and equitable, it is not essential that all the shares of the company, or all shares of the same class, should be reduced equally or rateably (p), *e.g.*, schemes of reduction have been sanctioned whereby shares which had been issued and fully paid were reduced, while those unissued were left unreduced (q), whereby some of the ordinary and some of the preference shares were to be surrendered and cancelled, whilst others remained unchanged (r), whereby the shares of certain shareholders were to be surrendered to the company and cancelled as the consideration for the purchase by them of part of the company's assets (s), and whereby the whole of the preference shares were purchased, in accordance with the provisions of the articles of association, out of monies set aside for the purpose from the net profits of the company, and cancelled, the ordinary shares remaining unaltered (t). Nor is it essential that the comparative voting powers of the different classes of shareholders should remain the same (u).

Losses how to
be borne
between different
classes of
shareholders.

5. But, subject to the power of the Court to sanction any scheme of reduction which is fair and equitable, in cases in which there are different classes of shares the reduction should be carried out so as to throw the loss on that class which, according to the constitution of the company, would

(o) *Barrow Haematite Steel Co.* [1900], 2 Ch. 846, affirmed W. N. 1901, p. 208. See, too, *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287.

(p) *Union Plate Glass Co.*, 42 Ch. D. 513, so far as it is a decision to the contrary, must be considered as overruled.

(q) *Pinkney & Sons' Steamship Co.* [1892], 3 Ch. 125; *Newberry-Vautin, &c., Limited*, ib. 127, note.

(r) *Gatling Gun, Limited*, 43 Ch. D. 628. The shares so surrendered were the vendor's shares; the company considered they had paid too much for the patents they had purchased.

(s) *Denver Hotel Co.* [1893], 1 Ch. 495; *British and American, &c., Corp. v. Couper* [1894], A. C. 399, where the

shares to be surrendered were some of the founders' shares and some of the ordinary shares.

(t) *Dicido Pier Co.* [1891], 2 Ch. 353. Having regard to the origin of the purchase money, this reduction was held not to involve a payment to any shareholder of any paid-up capital.

(u) *James Colmer, Limited* [1897], 1 Ch. 525, note the special article in this case. *Continental Union Gas Co.*, 7 Times, L. R. 476, must be considered as overruled on this point. In *Pinkney & Sons' Steamship Co.* [1892], 3 Ch. 125, the Court required the articles to be altered so as to reduce the voting power of the reduced shares in proportion to their reduced value.

have to bear it if the company were being wound up, *e.g.*, if the ordinary and preference shares are on an equal footing as regards capital, the shares of the two classes should be equally, or if of different amounts rateably, reduced (*x*); if the different classes of shares have different priorities as regards capital, the loss should be borne first by the class which stands last in order of priority, and so on by the different classes in the inverse order of their priorities (*y*).

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6. In the absence of any necessity for the proposed reduction and of any advantage to the company as a whole, the Court will not sanction a reduction which benefits one class of shareholders at the expense of another. Thus where the preference shareholders, though not entitled to any preference as to capital, were entitled to a fixed cumulative preferential dividend, and the ordinary shareholders were entitled to the rest of the profits, the Court declined to sanction a reduction of capital whereby the shares of both classes were to be equally reduced, as to do so would benefit the ordinary at the expense of the preference shareholders (*z*).

Reduction inequitable as between different classes of shareholders.

7. A company may, with the sanction of the Court and the approval of a special resolution of the shareholders, reduce its capital by returning part of its paid-up capital to its shareholders, although a portion of the capital so returned is immediately to be borrowed from them on the security of debentures (*a*).

Return of capital to be reborrowed.

(*x*) *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287; *Direct Spanish Tel. Co.*, *ib.* p. 307; *Barrow Haematite Steel Co.*, 39 Ch. D. 582; but compare *ib.* [1900], 2 Ch. 846, affirmed W. N. 1901, p. 208. In *Quebrada, &c., Copper Co.*, 40 Ch. D. 363, the Court sanctioned a scheme whereby the loss was thrown exclusively on the ordinary shareholders, but the petition was unopposed, and only three shareholders dissented. Compare *Union Plate Glass Co.*, 42 Ch. D. 513, where the Court refused to sanction such a scheme. This decision was right on the merits, though much of the reasoning has since been overruled, see *ante*, note (*p*).

[1895], 1 Ch. 691; *London and New York Investment Corp.* [1895], 2 Ch. 860; *Agricultural Hotel Co.* [1891], 1 Ch. 396; *American Pastoral Co.*, W. N. 890, p. 62.

(*z*) *Barrow Haematite Steel Co.* [1900], 2 Ch. 846. The company was earning large profits, and Cozens-Hardy, J. held that as the company could pay a dividend without replacing its lost capital (see *infra*, pp. 600, 601), there was no necessity for a reduction. His decision was affirmed by the Court of Appeal, W. N. 1901, p. 208, on the ground that the alleged loss of capital was not proved. Compare the first three cases in note (*x*), *supra*.

(*a*) *Nixon's Navigation Company* [1897], 1 Ch. 873; *Lamson Store*,

(*y*) *Floating Dock Co. of St. Thomas*

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Purchase of
shares.

Reduction on
loss of capital.

Notice to
creditors.

8. A company may, with such sanction and approval, reduce its capital by purchasing some of its shares either with cash (*b*) or a portion of its property (*c*), and then cancelling them.

9. With such sanction and approval the capital may be reduced whether fully paid up or not, and whether lost or not (*d*).

10. When a company seeks to reduce its capital on the ground that part of it has been lost or is unrepresented by available assets, this must be proved to the satisfaction of the Court. The amount of any reserve or unappropriated profits and the value of the goodwill must be taken into account (*e*); nor can capital properly expended in the payment of preliminary expenses (*f*), nor the amount of discount at which its shares have been issued (*g*), be treated as lost or as unrepresented by available assets.

11. Where the reduction of the capital involves either the diminution of a shareholder's liability or the payment to any shareholder of any paid-up capital (*h*), notice of an intended application to the Court must as a rule be given to the creditors (*i*); and security must be given to those creditors who will not assent (*k*).

etc., Co., Limited, ib. p. 875. Paid-up capital may be returned on the footing that it is liable to be called up again. *Watson, Walker and Quickfall, Limited*, W. N. 1898, p. 69; *Fore Street Warehouse Co.*, W. N. 1888, p. 155, and other cases cited in *Palmer's Company Precedents*, 7th ed., vol. 1, p. 974, and for form of minutes, ib. p. 977.

(*b*) *Dicido Pier Co.* [1891], 2 Ch. 353.

(*c*) *Denver Hotel Co.* [1893], 1 Ch. 495; *British American, etc., Corp. v. Couper* [1894], A. C. 399.

(*d*) 30 & 31 Vict. c. 131, § 9, and 40 & 41 Vict. c. 26, § 3. Prior to this Act the law was otherwise. See *Ebbw Vale Steel, etc., Co.*, 4 Ch. D. 827; *Kirkstall Brewery Co.*, 5 ib. 535, and compare *Crédit Foncier of England*, 11 Eq. 356.

(*e*) *Barrow Haematite Steel Co.* [1900], 2 Ch. 846, affirmed W. N.

1901, p. 208. As to the duty of directors to keep the company's property in repair, see *Floating Dock Company of St. Thomas* [1895], 1 Ch. 691.

(*f*) *Abstainers and General Ins. Co.* [1891], 2 Ch. 124.

(*g*) *New Chile Gold Mining Co.*, 38 Ch. D. 475. Such an issue is illegal, see *ante*, p. 159, note (*i*), and the Court will not sanction a reduction to correct it.

(*h*) See 40 & 41 Vict. c. 26, § 4; and *Dicido Pier Co.* [1891], 2 Ch. 353, and *ante*, p. 558, note (*l*).

(*i*) 30 & 31 Vict. c. 131, §§ 11 and 17. General Order March, 1868, r. 5. The advertisements directed in this rule may be dispensed with by the Judge if he is satisfied that the interests of creditors will not be affected, *Tambracherry Estates Co.*, 29 Ch. D. 683; and *Dicido Pier Co.* [1891], 2 Ch. 353.

(*k*) Ib. §§ 11, 13, and 14.

12. The application for the sanction of the Court is made by petition (*l*). When the reduction was to be effected by cancelling shares issued as paid up the Court used to require to be satisfied that § 25 of the Companies Act, 1867, had been complied with (*m*), but now that the section is repealed, perhaps the Court will no longer require this.

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Application
by petition.

13. The words "and reduced" must be temporarily added to the name of the company in all cases where the sanction of the Court to a reduction of capital is required, unless the Court dispenses with such addition (*n*); and the Court has only power to dispense with it where the reduction does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital (*o*). In such cases the words need not be added before the presentation of the petition (*p*); in other cases they must be added immediately after the passing of the special resolution (*q*).

Addition of
words "and
reduced."

14. The order of the Court confirming the special resolution, and the minute as to the capital required by the Act, must be registered with the registrar of joint-stock companies, and thereupon the special resolution so confirmed takes effect (*r*).

Registration
of order and
minute.

(*l*) 30 & 31 Vict. c. 131, § 11. Rules of 1868, r. 2. As to exhibits and evidence see *Omnium Investment Co.* [1895], 2 Ch. 127; as to the title of the petition *Ocean Steamship Co.* [1893], 2 Ch. 666.

(*m*) *Omnium Investment Co.* [1895], 2 Ch. 127, and see as to the repeal of the section, *infra*, p. 565.

(*n*) 30 & 31 Vict. c. 131, § 10. The Court now usually directs this addition to be used for a month after the order, but the period varies, e.g., it was three months in *Sharp v. Stewart & Co.*, 5 Eq. 155; one month in *Barrow Hæmatite Steel Co.*, 39 Ch. D. 582; *Ocean Steamship Co.* [1893], 2 Ch. 666; a fortnight in *Telegraph Construction Co.*, 10 Eq. 384, *Credit Foncier of England*, 11 Eq. 356, and *Patent*

Ventilating Granary Co., 12 Ch. D. 254.

(*o*) See 40 & 41 Vict. c. 26, § 4. If the company carries on business abroad the addition is usually dispensed with, see *Sumatra Tobacco, &c. Co.*, W. N. 1898, p. 80. When a company owned copyrights, and a change of name would create difficulty under the Copyright Acts, the addition was dispensed with on terms; *Lawrence and Bullen, Ltd.*, W. N. 1901, p. 158.

(*p*) See *ib.* § 4.

(*q*) 30 & 31 Vict. c. 131, § 10.

(*r*) 30 & 31 Vict. c. 131, §§ 15, 16, and see 40 & 41 Vict. c. 26, § 4. For forms of the minute to be registered, see *Barrow Hæmatite Steel Co.*, 39 Ch. D. 603; *Denver Hotel Co., Limited* [1893], 1 Ch. p. 506;

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evidence that the requisitions of the Act have been complied with, and that the capital is as stated in the minute (s).

Alteration of memorandum.

All copies of the memorandum of association issued after the reduction must be in accordance with it (t).

Settlement of list of creditors.

Where the liability to calls is to be diminished or a division of paid-up capital is to be made (u), a list of creditors has to be settled (x), a time is fixed for them to come in and object, and if they do not come in within the time fixed for the purpose, they cannot afterwards effectually dissent (y). But unless a consent on their behalf is produced the Court will order a sum equal in amount to the money owing to the non-consenting creditors to be paid into Court (z). Creditors who receive no notice of the intended reduction are entitled to be paid their debts not only by the company, but, if necessary, by compelling the then members of it to contribute to their payment (a).

Liability in case of improper return of capital.

If any portion of a company's capital is returned to the shareholders except in accordance with the provisions of the Acts, the directors who are responsible for the return are liable for the monies so misapplied, and each shareholder, who has received any part of such monies with knowledge that they form part of the company's capital, and that the sanction of the Court for its return has not been obtained, is liable to the company for the amount he has received, and to indemnify the directors to that extent (b).

Reduction of paid-up capital by return of profits.

By the Companies Act, 1880, power is given to a company to reduce its paid-up capital by a return of accumulated profits to the shareholders, or to such of them as are willing to accept

Newberry-Vautin, &c., Ltd. [1892], 3 Ch. p. 127, note; *Lamson Store, &c. Co.* [1897], 1 Ch. 875; *American Pastoral Co.*, W. N. 1890, p. 62; *International Conversion Trust, Ltd.*, W. N. 1892, p. 100, and W. N. 1888, pp. 54, 103.

(s) 30 & 31 Vict. c. 131, § 15; *Ladies Dress Association* [1900], 2 Q. B. 376.

(t) 30 & 31 Vict. c. 131, § 18.

(u) 40 & 41 Vict. c. 26, § 4.

(x) 30 & 31 Vict. c. 131, § 13. The Court cannot dispense with this; *Lamson Store, &c. Co.* [1895], 2 Ch. 726.

(y) *Crédit Foncier of England*, 11 Eq. 356, foot-note.

(z) *Patent Ventilating Granary Co.*, 12 Ch. D. 254.

(a) 30 & 31 Vict. c. 131, § 17. See the section.

(b) *Moxham v. Grant* [1900], 1 Q. B. 88.

such a return. In exercising this power the following matters must be attended to :—

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1. The profits in question must be capable of being distributed amongst the shareholders, with their consent, in the shape of a dividend or bonus (c) ;

2. A special resolution for the return of these profits or a part of them must be passed (d) ;

3. A memorandum containing the necessary particulars must be produced to and registered by the registrar of joint stock companies before the resolution can take effect (e) ;

4. Since shareholders are at liberty to require the company to retain the monies paid upon their shares (f) the company must specify (g)

1) in the annual lists of members returnable under § 26 of the Companies Act, 1862, the amounts so retained by them ;

2) in the statements of account laid before any general meeting the amount of undivided profits which have been returned.

The capital of companies limited by shares governed by the Companies Act, 1862, may be consolidated and divided into shares of larger amount (h), and may, when paid up, be converted into stock (§§ 12 and 50); but notice of any such change must be given to the registrar (§ 28). The capital of such companies may, after conversion into stock, be reconverted into fully paid-up shares of any denomination (Companies Act, 1900, § 29).

Consolidation of
shares and con-
version into
stock.

Provision is also made by the Companies Act, 1867, for subdividing a company's shares. This may be done by special resolution, without the sanction of any Court (i) ; but the proportion between the amount paid and unpaid on the existing shares must be preserved (k) ; and all copies of the memorandum of association issued after the subdivision must be in accordance with it (l).

Subdivision of
shares.

(c) 43 Vict. c. 19, § 3.

(d) *Ib.*

(e) *Ib.* § 4.

(f) *Ib.* § 5.

(g) *Ib.* § 6.

(h) *Wakefield Rolling Stock Co.*

[1892], 3 Ch. 165, where this was done as to part only of the capital.

(i) 30 & 31 Vict. c. 131, § 21.

(k) *Ib.*

(l) § 22. As to the illegality of subdividing shares otherwise than

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Preference
shares.

Companies governed by the Companies Acts may issue preference shares unless in any particular case such an issue is inconsistent with the company's memorandum of association; the silence of the memorandum on this subject is not necessarily inconsistent with their issue (*m*). If such issue is not expressly authorised by the memorandum of association, or by the articles in their original form, the articles may be altered in this respect, if the alteration is not inconsistent with the memorandum of association (*n*). If, by the constitution of the company a special resolution is necessary to authorise the issue of preference shares and preference shares are issued without such a resolution, the irregular issue may be confirmed by a subsequent special resolution (*o*). Preference shares may be created and issued as fully paid up in consideration of the surrender of an equivalent amount of fully paid-up ordinary shares if the transaction is authorised by the constitution of the company and is not made for any improper purpose (*p*).

Arrangements
as to calls.

By the Act of 1867, special resolutions may be passed authorising arrangements on the issue of shares for a difference between their holders in the amount of calls to be paid, and the time of payment of such calls (*q*).

Reserve capital.

Under the provisions of the Companies Act, 1879, an unlimited company may when assenting to registration as a limited company, and a limited company may at any time by special resolution provide that a portion of its uncalled capital shall not be capable of being called up except in the event and for the purpose of the company being wound under the Act, see the cases of *Feiling and others*, 2 Ch. 714.

(*m*) See *ante*, p. 461, and cases in next note. In *Ashbury v. Watson*, 30 Ch. D. 376, the memorandum was held to be inconsistent with such an issue. In *Underwood v. London Music Hall, Ltd.* [1901], 2 Ch. 313, the memorandum was held to allow the issue of new shares with a preference over the original preference shares.

(*n*) *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361; *British and American, &c., Corp. v. Couper* [1894], A. C. 399, overruling *Hutton*

v. Scarborough Hotel Co., 2 Dr. & Sm. 514 and 521; 4 De G. J. & Sm. 672. See, too, as to the validity of a power in the original articles, *Bridgewater Navigation Co.*, 39 Ch. D. 1; *South Durham Brewery Co.*, 31 Ch. D. 261; *Harrison v. Mexican Rail Co.*, 19 Eq. 358. As to the alteration of articles, see *ante*, pp. 460 *et seq.*

(*o*) *London and New York, &c. Corp.* [1895], 2 Ch. 860.

(*p*) *Eichbaum v. City of Chicago, &c. Elevators, Ltd.* [1891], 3 Ch. 459; see too *Teasdale's case*, 9 Ch. 54.

(*q*) 30 & 31 Vict. c. 131, § 24.

up (*r*). When such a resolution has been passed, such portion of its capital cannot be called up except in that event and for that purpose (*s*), and consequently cannot be mortgaged or charged by the company or its directors (*t*). Bk. III. Chap. 3.
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In order to prevent the frauds which were committed by treating shares as paid up in full when they had only been paid for in land, goods, or services of very questionable value, it was enacted by 30 & 31 Vict. c. 131, § 25, that shares in companies registered under the Companies Act, 1862, were to be taken to be issued and held subject to the payment of the whole amount thereof in cash, unless there was a contract in writing to the contrary filed with the registrar of joint-stock companies at or before the issue of such shares. Paid-up shares,
Companies Act,
1867, § 25.

Registration of a contract in compliance with the section merely enabled shares to be paid for otherwise than in cash (*u*); it did not enable them to be treated as paid up to any greater extent than they had in fact been paid up either in money or money's worth (*v*). Though, as has been already observed, when shares are issued as fully paid up for a consideration other than cash the Court will not enquire into the value of the consideration, unless the agreement under which they were issued is impeached for fraud or misrepresentation (*vv*).

The section was found to work injustice (*w*), and it has been repealed by the Companies Act, 1900 (*x*), so that shares may now be paid up either in money or money's worth. But whenever any shares are allotted in whole or in part for a consideration other than cash the company must within a month thereafter file with the registrar of joint stock companies Companies Act,
1900.

(*r*) 42 & 43 Vict. c. 76, § 5.

(*s*) *Ib.* If such a provision is contained in the original articles the articles may be altered in this respect; *Malleson v. National Ins., &c., Corp.* [1894], 1 Ch. 200.

(*t*) *Bartlett v. Mayfair Property Co.* [1898], 2 Ch. 28; *Pyle Works*, 44 Ch. D. 534. Compare and distinguish *Newton v. Debenture-holders, &c., Investment Co.* [1895], A. C. 244. See *ante*, p. 316.

(*u*) As to what amounted to payment in cash, see *infra*, p. 570.

(*v*) *Welton v. Saffery* [1897], A. C. 299; *Eddystone Marine Insurance Co.* [1893], 3 Ch. 9; *Ooregum Gold Mining Co. v. Roper* [1892], A. C. 125, and other cases *infra*, Bk. IV. c. 1, § 13 (5).

(*vv*) See *Wragg, Ltd.* [1897], 1 Ch. 796, and other cases *ante*, p. 548, note (*z*).

(*w*) See the remarks of Vaughan-Williams, J., in *Preservation Syndicate* [1895], 2 Ch. 768.

(*x*) 62 & 63 Vict. c. 48, § 33.

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a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which the allotment was made, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted (y). Non-compliance with these requirements does not affect the allotment or impose any liability on the allottee, but a penalty is imposed upon any director or other officer of the company who is knowingly a party to the default (z).

Effect of repeal
of § 25 and of
Act of 1900.

The Act of 1900 also enacts (a) that no proceedings under § 25 of the Act of 1867 shall be commenced after the commencement of the Act of 1900 (*i.e.*, the 1st January, 1901). The meaning and effect of this enactment and of the repeal of § 25 of the Act of 1867 is by no means clear. In a recent case before the Court of Appeal (b) it was suggested that the repeal may not affect liability in respect of shares issued before the 1st January, 1901 (c). It is, however, submitted that such a construction fails to give sufficient effect to the prohibition against taking proceedings under § 25 of the Companies Act, 1867, coupled with § 31 of the Act of 1900, which provides that the Act shall, except as otherwise expressed, apply to every company whether formed before or after its commencement. Assuming the repeal to apply to such shares, it was also suggested (d) that the prohibition against proceedings under § 25 only protects the holders of shares, which were issued while that section was in force and were paid up otherwise than in cash without compliance with its requirements, from being called upon to pay up their shares in cash, and does not entitle them to the rights of holders of fully paid shares, as for instance, the right to share surplus assets in a winding up on the same footing as the holders of shares which have been paid up in cash. It is, however, submitted that this is putting too narrow a construction

(y) 62 & 63 Vict. c. 48, § 7. The 1 Ch. 637.
contracts must be duly stamped.

See, too, § 20 as to the annual returns.

(z) *Ib.* § 7 (2).

(a) *Ib.* § 33.

(b) *Brutton and Burney, Ltd.* [1901],

(c) See Interpretation Act, 1889,
52 & 53 Vict. c. 63, § 38.

(d) See, too, Mr. Palmer's note on
§ 33 in his book on *The Companies*
Act, 1900.

on the Act of 1900. Section 25 was introduced for the protection of creditors quite as much as, if not more than, for the protection of shareholders, and in considering whether to grant relief for non-compliance with the section the Court paid special regard to the rights of creditors and was always careful to see that they were not prejudiced (*e*); if, therefore, the repeal of the section and the prohibition in question have deprived creditors of their rights, there seems no sufficient reason to keep the section, so to speak, alive for the benefit of the other shareholders. This result seems even less reasonable when it is observed that if the construction now under consideration is correct, the Act has deprived the liquidator of the power to make calls on the holders of such shares for the adjustment of the rights of the contributories *inter se*. It is submitted, therefore, that the effect of the enactment in question is that, except in the case of shares in respect of which proceedings had been commenced before the 1st January, 1901, all shares, whether issued before or after the commencement of the Act of 1900, are to be treated as paid up to the extent to which they have in fact been paid up in money or money's worth (*f*). But having regard to the doubts above suggested, and to the fact that the Companies Act, 1898, by which new powers for granting relief in cases of non-compliance with § 25 were conferred upon the Court, is still in force (*g*), it has been thought that a collection of the more important decisions relating to § 25 of the Act of 1867, and to the Companies Act, 1898, may be useful. A note on this subject has therefore been added to the present section of this chapter.

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The amount of a company's capital or stock, the shares

(*e*) See the words in § 1 of the Companies Act, 1898; and under § 35 of the Act of 1862, *Preservation Syndicate* [1895], 2 Ch. 768, and *Darlington Forge Co.*, 34 Ch. D. 522.

Return, showing capital, &c.

(*f*) Notice, too, that § 19, which requires the annual summary after a winding up under § 26 of the Act of 1862 to distinguish between shares issued for cash and shares issued otherwise than for cash,

applies to shares issued and to companies registered before as well as after the commencement of the Act. As to not enquiring as to the value when the consideration is not in cash, see *ante*, p. 548.

(*g*) In *Brutton & Burney, Ltd.* [1901], 1 Ch. 637, the Court granted relief under this Act notwithstanding the repeal of § 25.

Bk. III. Chap. 3. into which the former is divided, and in which the latter is
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held, the persons to whom the shares or stock belong, the dates of transfers, and the amounts of calls paid and unpaid, must appear with other matters in the returns required to be made annually to the registrar (Act of 1862, §§ 26 and 29, and Act of 1900, § 19), and these returns must distinguish between shares issued for cash and shares issued otherwise than for cash or only partly for cash (Act of 1900, § 19).

Companies Act,
1862.

Table A.

Provisions as to
capital.

By the regulations in Table A., the directors may, with the sanction of a special resolution of the members, increase the capital of the company by issuing new shares (No. 26). The amount of the increase and the amounts of the shares into which the increased capital is to be divided, rest with the members; but if they give no directions upon the subject, then with the directors (ib.). Unless the meeting, authorising the increase, gives directions to the contrary, all new shares are to be offered to the members (i) in proportion to the existing shares held by them (No. 27). Shares not accepted by the members may be disposed of by the directors as they think most beneficial to the company (ib.). Any capital raised by the creation of new shares is to be considered as part of the original capital, and is subject to the same provisions as regards calls and forfeiture of shares (No. 28) (k).

By the same regulations, the directors may, with the sanction of the members, convert any paid-up shares into stock (No. 23, §§ 12, 28, and 34 of the Act). The transfer of stock is, as far as practicable, subject to the same regulations as the transfer of shares (No. 24), and the rights of stockholders are assimilated, as nearly as circumstances will permit, to the rights of shareholders (Nos. 24 and 25; and see § 29 of the Act).

(i) Including deceased members whose shares have not been transferred. *James v. Buena Ventura Syndicate* [1896], 1 Ch. 456.

(k) Clauses similar to these were contained in Table B. to the Act of 1856. They were discussed with

reference to borrowing money, in *Bryon v. Metropolitan Saloon Omnibus Co.*, 4 Jur. N. S. 680, and 3 De G. & J. 123; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

With respect to existing companies registered under the Act but not formed under it, the amount of their capital and the number of their shares, and the person to whom they belong, and the amounts paid on them, must all be stated in the documents sent to the registrar (§ 188); and if the capital has been converted into stock, the amount of such stock, and the persons entitled to it, must be similarly stated (§ 185). Shares in these companies need not be numbered if they were not numbered before registration (§ 196, cl. 2). Subject, however, to the provisions of any special Act of Parliament, or letters patent, the foregoing remarks concerning the capital and shares of new companies appear to be applicable to existing companies after their registration (see § 196; and as to companies registered under the Acts of 1856–1858, see §§ 176–178).

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Capital of exist-
ing companies.

Note on § 25 of the Companies Act, 1867.

Section 25 of the Companies Act, 1867, applied whether a company was being wound up or not (*l*), and to subscribers of the memorandum of association as well as to other members (*m*).

The contract in writing to be of any avail had to be filed at or before the issue of the shares to which it related (*n*).

Time when con-
tract must be
filed.

Shares are issued within the meaning of this section when they have been registered in some person's name (*o*), or when a certificate of their ownership has been given (*p*). Probably an allotment would be held to be an issue (*q*). It has also been held that shares for which a person has subscribed the memorandum of association are issued within the meaning of this section immediately on the incorporation of the company by the registration of the memorandum, consequently it is doubtful whether a contract can be filed within the time required by the section so as to protect such shares (*r*).

Shares when
issued.

The contract in writing required to be filed must be some contract distinct from the articles of association (*s*). It must be a contract (*t*)

What is a
sufficient con-
tract.

(*l*) For the general object of the section, see *Almada and Tirito Co.*, 38 Ch. D. 415. As to companies not being wound up, see *Burkinshaw v. Nicholls*, 3 App. Ca. 1004; *Gibson & Co.*, 5 L. R. Ir. 139.

(*m*) See *Coates' case*, 17 Eq. 169; *Fothergill's case*, 8 Ch. 270.

(*n*) See *Pool's case*, 5 Ch. D. 579, and cases in the next four notes.

(*o*) *Blyth's case*, 4 Ch. D. 140; *Gibson & Co.*, 5 L. R. Ir. 139.

(*p*) *Bush's case*, 9 Ch. 554.

(*q*) But see *Clark's case*, 8 Ch. D. 635, where the allotment was made

under a mistake.

(*r*) See *Dalton Time Lock Co. v. Dalton*, 66 L. T. 704; *Jarvis & Co.* [1899], 1 Ch. 193; *Archibald Dawmay, Ltd.*, W. N. 1900, p. 152; but see *Whitehead and Brothers, Ltd.* [1900], 1 Ch. 804.

(*s*) *Firmstone's case*, 20 Eq. 524; *Crickmer's case*, 10 Ch. 614; *Pritchard's case*, 8 Ch. 956; *Appletreewick Lead Mining Co.*, 18 Eq. 95, contra, must be treated as overruled.

(*t*) See *Smith v. Brown* [1896], A. C. 614.

Bk. III. Chap. 3. signed by the parties to it (u). It must state the consideration sufficiently to disclose its nature (x), and must be one under which the company is bound to allot the shares (y) if they are applied for (z). On the other hand it is not necessary that the contract should be between the company and the person to whom the shares are to be allotted; a contract with a trustee for the company is sufficient whether the company is actually in existence or not (a), and the allottee need not be a party to it or mentioned in it (b). Nor need the contract identify the shares by their numbers or otherwise (c), though this is certainly advisable, for in the absence of such identification there may be difficulty in proving that the shares in question are the same as those allotted under the contract (d). Moreover, the original contract need not be filed; a confirmatory contract if it complies with the requirements of the section is sufficient (e).

The duty of registering the contract seems to have been on the person seeking to enforce it (f).

Payment in cash.

In construing the expression payment in cash, which occurs in § 25 of the Act of 1867, the Courts have upheld honest transactions in which no cash has passed; they have treated payment in cash as equivalent to payment within the meaning of a plea of payment at common law, and have held payment in cash to mean payment as distinguished from set-off or accord and satisfaction (g). Accordingly, payment of a balance of an account stated, and in which the nominal amount of the shares is entered, is

(u) *Ex parte Menzies*, 43 Ch. D. 118.

(x) *Robert Watson & Co., Ltd.* [1899], 2 Ch. 509; *S. Frost & Co., Ltd.* [1899], 2 Ch. 207, affirming *ib.* [1898], 2 Ch. 556, and dissenting from *Maynard & Co., Ltd.* [1898], 1 Ch. 515. Stating the consideration merely by reference to a document not on the file is insufficient, *Karashkoma Exploring Syndicate* [1897], 2 Ch. 451; *Robert Watson & Co., Ltd.* [1899], 2 Ch. 509, *secus* if the other document is filed, see *Markham and Darter's case* [1899], 2 Ch. 480.

(y) *Jackson & Co., Ltd.* [1899], 1 Ch. 348, where the company had an option to pay in cash shares or debentures.

(z) *Elsner and McArthur's case* [1895], 2 Ch. 759; *Transvaal Exploring Co. v. Albion, &c., Mines* [1899], 2 Ch. 370.

(a) *Elsner and McArthur's case* [1895], 2 Ch. 759; and *Hartley's case*, 10 Ch. 157; compare *Smith v. Brown* [1896], A. C. 614.

(b) *Carling's case*, 1 Ch. D. 115;

Elsner and McArthur's case [1895], 2 Ch. 759; but see *Spiers and Beven's case* [1899], 1 Ch. 210.

(c) *Ex parte Forde*, 30 Ch. D. 153; *Elsner and McArthur's case* [1895], 2 Ch. 759; *Jackson & Co., Ltd.* [1899], 1 Ch. 348; *Coate's case*, 17 Eq. 169. *Qu.* if the shares must not be numbered in the case of a banking company, see 30 & 31 Vict. c. 29, § 1.

(d) See *Spiers and Beven's case* [1899], 1 Ch. 210.

(e) *S. Frost & Co.* [1899], 2 Ch. 207.

(f) *Arnot's case*, 36 Ch. D. 702. As to compelling the registrar by mandamus to register a contract, see *R. v. Registrar of Joint-Stock Companies*, 21 Q. B. D. 131, when he refused on the ground that the contract was insufficiently stamped.

(g) See *Spargo's case*, 8 Ch. 407; approved in *Larocque v. Beauchemin* [1897], A. C. 359; *North Sydney, &c. Tram. Co. v. Higgins* [1899], A. C. 263; *Fothergill's case*, *ib.* 270; *Pagin and Gill's case*, 6 Ch. D. 681; *Andress's case*, 8 Ch. D. 126; *Gibson*

sufficient (h); and even the settlement of an account treating the amount of the shares as paid by the sums on the other side of the account is sufficient if those sums are *bonâ fide* due from the company to the shareholder (i). On the other hand, if the original contract is that property or services shall be paid for in fully paid-up shares (k), or may be so paid for at the option of either party (l), or if a person to whom the company is indebted accepts shares issued as fully paid up in satisfaction of his debt (m), the person who accepts the fully paid-up shares, will not be considered to have paid for them in cash. And neither giving nominally paid-up shares in satisfaction of the liability to calls on unpaid-up shares (n), nor an agreement to apply a debt payable by the company *in futuro* in paying up shares in advance, is a payment in cash (o). But if there is a debt presently due from the company, the money so due may be set off against or applied in satisfaction of the liability of a holder of unpaid shares to pay future calls not yet made, so as to render such shares paid up in cash (p).

Where shares have been allotted as paid up in full or in part for a consideration other than cash, pursuant to a contract to that effect, but section 25 of the Act of 1867 has not been complied with, the Court will in a proper case, if satisfied that creditors will not be prejudiced, order the register to be rectified, so that the shares may be re-issued after a proper contract has been filed (q); but this relief cannot be granted after the commencement of the winding up of the company (r).

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Relief in case of non-compliance with the section.
(a) Rectification of the register.

& Co., 5 L. R., Ir. 139; distinguish *Ex parte Zoutpansberg Prospecting Co.* [1891], 1 Ch. 119, and *Cleland's case*, 14 Eq. 387.

(h) *Spargo's case*, 8 Ch. 407; *Barrow-in-Furness Investment Co.*, 14 Ch. D. 400.

(i) *North Sydney, &c., Tram. Co. v. Higgins* [1899], A. C. 263, and *Larocque v. Beauchemin* [1897], A. C. 359; *Coates' case*, 17 Eq. 169, was decided on this principle, but *quæ* whether there was there a sufficient settlement of the account. See, also, *Maynard's case*, 9 Ch. 60; *Ferrao's case*, *ib.* 355, which, however, did not turn on this section.

(k) *Pagin and Gill's case*, 6 Ch. D. 681; *Andress's case*, 8 Ch. D. 126; *White's case*, 12 Ch. D. 511; *Burkinshaw v. Nicolls*, 3 App. Ca. 1004. *Ex parte Bentley*, 12 Ch. D. 850, does not seem to be in accordance with the other authorities.

(l) *Barrow's case*, 14 Ch. D. 432.

(m) *Ex parte Zoutpansberg Prospecting Co.* [1891], 1 Ch. 119;

Cleland's case, 14 Eq. 387.

(n) *Fothergill's case*, 8 Ch. 270.

(o) *Kent's case*, 39 Ch. D. 259, affirming 37 Ch. D. 508. The transaction in this case was also invalid on the ground of fraudulent preference. See, too, *Washington Diamond Mining Co.* [1893], 3 Ch. 95.

(p) *Jones, Lloyd & Co., Ltd.*, 41 Ch. D. 159; *Ferrao's case*, 9 Ch. 355; *Adamson's case*, 18 Eq. 670.

(q) See cases, *ante*, p. 169. In *Dublin and Wicklow Manure Co.*, 13 Ir. L. R. 200, the Court granted an order for registering a contract for 3,000 fully paid-up shares more than six years after the original issue of the shares, on being satisfied that the creditors would not be prejudiced. Terms for the protection of creditors were imposed in *Preservation Syndicate, Ltd.* [1895], 2 Ch. 768; and *Darlington Forge Co.*, 34 Ch. D. 522.

(r) See *ante*, p. 92. Compare *Preservation Syndicate* [1895], 2 Ch. 768, where the proceedings were commenced before the winding up.

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(b) Companies
Act, 1898.

Discretion of
the Court.

Relief may still be obtained in this manner (s), though now it is more usual to apply for relief under the Companies Act, 1898. That Act enables the Court, whenever shares have been issued as fully or partly paid without compliance with the requirements of § 25 of the Act of 1867, to grant relief at any time either before or after the commencement of the winding up of the company, and either before or after the commencement of proceedings for enforcing the liability on such shares, if satisfied that the omission to comply with the section was accidental or due to inadvertence, or that for any reason it would be just and equitable to grant relief, and the Court may in doing so impose such terms and conditions as to costs or otherwise as it thinks fit (t). The power to grant relief under this Act is an additional power (u), but except that relief may now be granted after the commencement of the winding up, this Act does not seem to have extended the power of the Court to grant relief in these cases. The form of relief is, however, different, for instead of ordering the register to be rectified, the Court orders either a sufficient contract (x), or if that would cause delay or inconvenience or be impracticable, a memorandum in writing (y) to be filed with the registrar of joint stock companies, and directs that it shall operate as if it were a contract duly filed in compliance with section 25 (z). The application for relief may be made by the company or by any person interested in the shares, and the contract or memorandum when filed enures for the benefit of all the shares to which it relates (a). The application should be made by summons, but may be made by motion; in either case it will be heard in open Court (b).

The Court has a discretion in every case, and may refuse relief if the applicant has not acted with due caution and conscientiousness (c). Relief has been granted under this Act when the omission to file a contract was due to ignorance of the provisions of the Act of 1867 (d). It is uncertain whether, and to what extent, the Court can or will grant relief in order to protect shares for which a person has subscribed the memorandum of association (e).

(s) 61 & 62 Vict. c. 26, § 2.

(t) *Ib.* § 1. And see as to costs, *Stephenson's case* [1900], 2 Ch. 442.

(u) *Ib.* § 2.

(x) The Court may order a supplemental contract, *Jackson & Co.* [1899], 1 Ch. 348, or an unfiled contract referred to by a contract already on the file, *Robert Watson & Co., Ltd.* [1899], 2 Ch. 509, to be filed.

(y) For forms of such memoranda see *Whitefriars Financial Co., Ltd.* [1899], 1 Ch. 184, and *Reeves & Son, Ltd.*, *ib.* p. 191; *Brutton & Burney, Ltd.* [1901], 1 Ch. 643.

(z) 61 & 62 Vict. c. 26, § 1 (4). The contract or memorandum must be duly stamped.

(a) *Ib.* § 1 (1). *Whitefriars Financial Co., Ltd.* [1899], 1 Ch. 184.

(b) See *ib.* p. 189. Unless the company is being wound up, the application should be to a judge in the Chancery Division; if it is being wound up it may be made to the judge to whom the winding up business is assigned, *British Columbian, &c., Estates, Ltd.*, W. N. 1899, p. 32.

(c) *Spiers & Beven's case* [1899] 1 Ch. 210.

(d) *Jackson & Co.* [1899], 1 Ch. 348.

(e) Compare *Jarvis & Co.* [1899], 1 Ch. 193; *Archibald Daunay, Ltd.*, W. N. 1900, p. 152, with *Whithead & Bros., Ltd.* [1900], 1 Ch. 804.

Relief under this Act may be and has been granted notwithstanding the repeal of the 25th section of the Companies Act, 1867, by the Companies Act, 1900 (*f*). Bk. III. Chap. 3.
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SECTION II.—OF CALLS.

Capitals of companies are usually raised by instalments Different kinds
of calls.
or calls.

“A call,” is an expression used to denote both a demand for money, and also the sum demanded; and in this last sense it signifies either the whole sum required to be raised at one time from the members of a company by a contribution amongst themselves, or that proportion of this entire sum which is payable in respect of each share.

There are two kinds of calls. First, there are those calls which are nothing more than the unpaid-up portions of the nominal capital of a company (*g*); and, secondly, there are those calls which are contributions required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and shareholders to contribute the sums fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts (*h*). If this liability is unlimited, the amount of calls (of the second kind) which a shareholder may be compelled to pay, depends entirely on the amount of the debts to be liquidated, and upon the number of the solvent co-shareholders. But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company. In the ensuing pages it is proposed to examine the law respecting calls of the first kind, so far as it relates to the persons empowered to make them, the purposes for, and the manner in which they may be made, the persons liable to pay them, and the law relating to actions for their

(*f*) See *Brutton & Burney, Ltd.* [1901], 1 Ch. 637. [1900], 2 Ch. 50.

(*g*) See, too, *infra*, p. 587, note (*z*). Payments on application or on allotment or in accordance with the terms of allotment are not calls. See *Croskey v. Bank of Wales*, 4 Giff. 314; *Alexander v. Automatic Telephone Co.*

(*h*) The difference here alluded to is illustrated by *Hull Flax Co. v. Wellesley*, 6 H. & N. 38, in which it was held that calls made by liquidators might be recovered, although the notices required for other calls had not been given.

Bk. III. Chap. 3. recovery. The right to forfeit shares for the non-payment of calls will be noticed in a subsequent part of the work (*infra*, ch. 6).
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The power of companies to mortgage or charge their uncalled capital has already been discussed (*ante*, pp. 316 *et seq.* and p. 344).

1. *Of the persons by whom calls may be made.*

By whom calls may be made.

The terms of the instrument which regulates the internal affairs of each company must be ascertained before the persons empowered to make calls on its shareholders can be known. Generally speaking, this power is naturally vested in the directors of the company. There is no statutable provision upon this subject applicable to banking companies governed by 7 Geo. 4, c. 46; nor to companies governed by the Letters Patent Act of 7 Wm. 4 & 1 Vict. c. 73. In ordinary cost-book companies calls are made by the shareholders (*i*).

In companies governed by 7 Geo. 4, c. 46, 7 Wm. 4 & 1 Vict. c. 73.

In companies governed by 8 & 9 Vict. c. 16.

By the Companies Clauses Consolidation Act the power to make calls is given to the company where its special Act is silent on the subject (*k*); and it has been held, that this power is one which may be exercised by the directors, and that consequently a general meeting of the shareholders need not be held for the purpose of making a call (*l*).

Companies governed by the Companies Act, 1862.

By Table A in the schedule to the Companies Act, 1862, the power of making calls is exerciseable by the directors (*m*); and this rule applies to all companies limited by shares and formed under that Act, and having no articles of association of their own. The Act itself, however, is silent upon the subject, and leaves the authority to make calls to be settled by the regulations of each company.

Calls made by directors *de jure*.

Where the power to make calls resides in the directors, a call made by those directors who are so *de jure* is valid, although an attempt may have been made to remove them, and other directors may have been (improperly) elected to take their place (*n*).

Calls made by improper persons.

It need hardly be observed, that a call made by persons who have not the right to make it, is altogether

(i) See 32 & 33 Vict. c. 19, § 10.

(m) Table A., No. 4.

(k) 8 & 9 Vict. c. 16, § 22.

(n) *Swansea Dock Co. v. Levin*,

(l) *Ib.* § 90. See *Ambergate, &c.*, 20 L. J. Ex. 447.

Rail. Co. v. Mitchell, 4 Ex. 540.

invalid (o). Nevertheless, if there is a provision in the regulations of the company that the acts of directors shall be good notwithstanding an irregularity in their appointment, a call may be good, though one of the persons who purported to make it had ceased to be a director (p). Bk. III. Chap. 3.
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Where the power to make a call is exerciseable by a certain number of persons collectively, a valid call cannot be made at a meeting at which less than the requisite number is present. The authorities on this point are numerous and conclusive (q). However, in *The Southampton Dock Company v. Richards* (r), power to make calls was given by a special Act of Parliament to the directors of a company, and it was held that a call made by a court of directors (i.e., by three of them) was valid, inasmuch as in the Act the expressions "the directors" and "a court of directors" were used indiscriminately. Calls must be made by the requisite number of persons.

Southampton Dock Company v. Richards.

2. The purposes for which calls may be made.

First, as to starting the company.

It has been seen already that a person who agrees to take shares in a company formed for a given purpose, and with a given capital, is not bound to accept shares in a company formed for another purpose, or with a different capital; and it follows from this that a variation in the original scheme, if unassented to by a subscriber to it, affords an answer to any application for calls which may be made upon him (s). And if no concluded agreement has been entered into, binding an allottee of shares to accept them, and to become a shareholder, Calls made to start a company.

Calls on allottees of scrip, &c.

(o) See *Garden Gully Co. v. McLister*, 1 App. Ca. 39; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, and the remarks on this case in *York Tramways Co. v. Willows*, 8 Q. B. D. 685, and *London & South-Eastern Counties Land Co.*, 31 Ch. D. 223, in which case § 67 of the Companies Act, 1862, was not referred to. The general issue raised the question of validity. *South-Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497.

(p) As in Companies Act, 1862, § 67, Table A., No. 71; Companies

Clauses Consolidation Act, 1845, § 99. *Dawson v. African Consolidated, &c., Co.* [1898], 1 Ch. 6. As to the effect of such a provision, see *ante*, p. 415.

(q) See *Bottomley's case*, 16 Ch. D. 681; *Kirk v. Bell*, 16 Q. B. 290, and similar cases cited *ante*, pp. 205, *et seq.*, and compare *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552, and case in last note.

(r) 1 Man. & Gr. 448. *Southampton Dock Co. v. Arnett*, ib.

(s) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17.

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Before the whole
capital has been
subscribed.

he cannot be liable to calls (t). But if a subscriber to a company binds himself to take shares in a company which may differ, more or less, from that originally proposed to be formed, he cannot set up a variation in the original scheme as an answer to a demand for payment of the capital he has undertaken to contribute (u). Again, although the whole of a company's intended capital has not been subscribed, it does not follow that those who have subscribed are not bound to furnish funds to enable it to commence operations. If by a company's special Act or charter the subscription of the whole, or a definite part of the proposed capital, is made a condition precedent to the right to require payment of anything from those who have subscribed, effect must be given to such a condition (x). Apart from the provisions of the Companies Act, 1900, there is nothing in any general Act now in force having any such effect (y); and consequently, in cases to which that Act does not apply, where there is no special Act or charter affecting the question, the liability of a subscriber to a company to contribute to its capital before the whole has been subscribed for depends entirely upon the contract into which he may have entered; and there are several instances in which persons have been held bound so to contribute, although the whole capital of the company which they had joined had not been subscribed for (z). *Primâ facie*, however, they are not so bound (a); and in all the cases in which they were held bound, the defendants had entered into a contract which precluded them from maintaining that the

(t) *Duke v. Andrews*, 2 Ex. 290.

(u) *Ante*, pp. 26 *et seq.*, and p. 146; *Midland, &c., Rail. Co. v. Gordon*, 16 M. & W. 804; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414; *Norman v. Mitchell*, 5 De G. M. & G. 648, and 19 Beav. 278. See, too, *Kilwelly Canal Co. v. Raby*, 2 Price, 93.

(x) *Norwich and Lowestoft Nav. Co. v. Theobald*, 1 Moo. & M. 151. And see *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172; *Peirce v. Jersey Waterworks Co.*, 5 ib. 209.

(y) There was a clause to the effect in question in the repealed Act relating to banking companies formed after May, 1844. See 7 & 8 Vict. c. 113, § 5.

(z) *MacDougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; *Lyon's case*, 35 Beav. 646. See *Scottish Petroleum Co.*, 23 Ch. D. p. 422.

(a) See *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davis*, 5 M. & W. 2; *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172.

subscription of the whole of the originally proposed capital was an express or implied condition to their becoming shareholders (b). Bk. III. Chap. 3.
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By the Companies Act, 1900, no company may on the first occasion on which it offers its shares to the public for subscription make any allotment of such shares unless the minimum subscription has been obtained, and the application money in respect thereof has been paid (c). Until, therefore, this condition has been fulfilled, no calls can be made in respect of these shares. The Act also provides that no company registered after the 31st December, 1900, which offers its shares to the public for subscription, shall commence business until shares to an amount not less than the minimum subscription have been allotted and certain other conditions have been fulfilled, and that until such a company is entitled to commence business all contracts previously made are only provisional (d). It may be, therefore, that calls (e) cannot be made on the shares of a company to which this enactment applies until the company is entitled to commence business. Companies Act,
1900.

With respect to other companies formed under the Companies Act, 1862, and having no special articles of their own, it is conceived that the directors have power to commence business, and make calls before the whole capital is subscribed for (f).

Secondly, as to carrying on the business of the company.

The unpaid-up instalments of a capital, agreed to be subscribed for a given purpose, cannot be lawfully required to be paid up for any purpose other than that to which the capital itself is by agreement properly applicable. In other words, a Calls made to
continue the
company's
business.

(b) See *Hutt v. Giles*, 12 M. & W. 492; *Waterford, Wexford, &c., Rail. Co. v. Dalbiac*, 6 Ex. 443; *London and Continental Ass. Co. v. Redgrave*, 4 C. B. N. S. 524; *Norman v. Mitchell*, 5 De G. M. & G. 648, and 19 Beav. 278.

(c) 63 & 64 Vict. c. 48, § 4, and *ante*, pp. 41 *et seq.*

(d) *Ib.* § 6.

(e) Money payable on application or allotment, or by the terms of allotment, are not calls. See *ante*, p. 573, note (g).

(f) *Ornamental Pyrographic Co. v. Brown*, 2 H. & C. 63, and *MacDoughall v. Jersey Hotel Co.*, 2 Hem. & M. 528; *Lyon's case*, 35 Beav. 646. *Howbeach Coal Co. v. Teagus*, 5 H. & N. 151, however, contains dicta to the contrary; and see *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172, which, however, turned on the articles.

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call cannot be lawfully made upon the shareholders of a company for any purpose not warranted by the constitution of that company (g). If it is made by the proper authority, in the proper form, and for a purpose which is not improper, then although some of the shareholders may disapprove of it, the call will be valid, and a court will not take upon itself to decide whether it ought or ought not to be made, but will leave that question to the decision of the shareholders themselves (h). But if a call is made for a purpose not warranted by the constitution of the company, such call will be invalid, and a court will interfere, even at the instance of one single dissentient shareholder, to prevent the making of such a call. The authorities bearing upon this subject will be adverted to hereafter, when the principles which guide the Court in interfering in matters connected with the internal affairs of companies come to be discussed (Bk. III. c. 9, § 2). There appears to be no objection in principle to making calls to meet prospective and estimated expenses; but it seems that in ordinary cost-book companies such calls were formerly considered improper (i).

Improper calls.

The power of making a call must be exercised as a trust (k), so as not to oppress or favour one shareholder, or set of shareholders, more than another; and if a call, which ought to be made on all the shareholders rateably, is made on some of them exclusively of the others, redress may be had (l). So, if a call is made on one shareholder only, with a view to

(g) In an action for calls this defence was open on a plea of never indebted. *South-East. Rail. Co. v. Hebblewhite*, 12 A. & E. 497.

(h) *Yetts v. Norfolk Rail. Co.*, 3 De G. & S. 293; *Cooper v. Shropshire Union Rail. and Can. Co.*, 6 Rail. Ca. 136, and 13 Jur. 443. See, also, *Orr v. Glasgow Rail. Co.*, 3 McQu. 799, where the money already obtained was applied to a purpose which was improper, unless sanctioned by a majority of shareholders.

(i) Such calls can, however, now

be made for the estimated expenses of three months. See 32 & 33 Vict. c. 19, § 11.

(k) See *Gilbert's case*, 5 Ch. 559; *Cawley & Co.*, 42 Ch. D. 209; and *Alexander v. Automatic Telephone Co.* 1900], 2 Ch. 56, noticed *ante*, p. 531.

(l) *Preston v. Grand Coll. Dock Co.*, 11 Sim. 327. Compare *Mangles v. Grand Coll. Dock Co.*, 10 ib. 519; *Bailey v. Birkenhead, &c., Rail. Co.*, 12 Beav. 433; *Yetts v. Norfolk Rail. Co.*, 3 De G. & S. 293. These cases will be considered hereafter, c. 9, § 2.

enable him to make default and have his shares forfeited, and thus get out of the company, the call, and all the proceedings founded upon it, will be nugatory as against the other shareholders (*m*). Bk. III. Chap. 3.
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A creditor who has obtained judgment against a company and cannot obtain satisfaction by execution in the ordinary way, has been held not entitled to a mandamus to compel the company to pay him by means of a call (*n*). But as before the Judicature Acts a court of equity would, so now it is submitted any Division of the High Court will, if necessary, assist a person entitled to payment out of the funds of a company by making a call on the shareholders, and compelling them to furnish so much of the unpaid-up capital as may be required to liquidate the demand upon them (*o*). Whether they can be compelled to furnish more than their respective unpaid-up instalments depends in each case upon the constitution of the company, *i.e.*, upon whether the liability of the shareholders is limited or unlimited. Mandamus to
make a call.

Action to compel
the making of a
call.

The amount of each call (meaning thereby an instalment of capital) (*p*), is generally fixed by those to whom the power of making calls is entrusted. Where there is no special provision in a company's Act, charter, or regulations, limiting the amount of each call, that amount must be considered discretionary, subject only to the limits which are set, first, by the rule that no call can be made upon the shareholders of any company for any purpose not warranted by the constitution of that company; and secondly, by the rule that the shareholders are not bound to contribute more than the capital which may have been agreed upon. Amount of call
to be made.

Statements are sometimes made in prospectuses that it is Intention not to
make a call.

(*m*) *Richmond's case* and *Painter's case*, 4 K. & J. 305.

(*n*) *R. v. Victoria Park Co.*, 1 Q. B. 288. See, also, *The York Buildings Co.*, 2 Atk. 56.

(*o*) *Laro v. London Indisputable Pol. Co.*, 1 K. & J. 223; *Ex parte Durham*, 4 K. & J. 517; *Talbot's case*, 5 De G. & S. 386. The 7 & 8 Vict. c. 113, § 31, provided for

making calls for the indemnity of a shareholder who had been compelled to pay a debt of the company. No Act now in force contains any such provision; but his right to indemnity in such a case is clear. Whether his remedy would be by action or by a petition to wind up would depend on circumstances.

(*p*) *Ante*, p. 573.

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not intended to call up more than part of the capital; but such statements afford no defence to a call for more than the amount stated. A statement of a present intention does not preclude a subsequent change. Even if a provision to that effect is contained in the company's articles of association, the provision may be abrogated by an alteration of the articles (*q*).

Reserve capital.

The provisions of the Companies Act, 1879, which enable companies subject thereto to create a reserve capital which can only be called up in the event and for the purposes of a winding up, and the position of such reserve capital, have been already mentioned (*r*).

Difference in liability to calls.

The Companies Act, 1867, allows companies subject to it to make provision on the issue of any shares for a difference between the holders of such shares in the amount of calls to be paid, and the time of payment (*s*).

Calls to compel repayment of returned capital or accumulated profits.

Whether a call can be made on persons who have once paid up their shares in full but to whom part of the paid-up capital has been returned, is a question which turns on the true construction of the Act, charter, or other instrument, conferring the power to make calls. But unless there are words showing the contrary, the power to make calls in such a case would be considered as exhausted. It would not, however, follow that the returned capital could not be recovered back (*t*). If the return is *ultra vires*, the amount returned can be recovered from the directors responsible for the return, and each shareholder who has received any of the monies so returned with knowledge of the facts which render its return *ultra vires*, is liable for what he has himself received (*u*). On a reduction of capital under the Companies Act, 1877, capital may be returned on the footing that it is liable to be called up again (*v*). And when the accumulated profits of any company are returned to

(*q*) *Malleon v. National Ins. Corp.* [1894], 1 Ch. 200; and *ante*, p. 462.

(*r*) 42 & 43 Vict. c. 76, § 5, and *ante*, p. 564. Such capital cannot be charged by the company. See *ante*, p. 316.

(*s*) 30 & 31 Vict. c. 131, § 24.

(*t*) See the Companies' Clauses Cons. Act, 1845, § 121, and as to

registered companies, compare *The Cardiff Coal Co.*, 11 W. R. 1007, with *Cardiff Coal Co. v. Norton*, 2 Eq. 558 and 2 Ch. 405; *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 ib. 104.

(*u*) *Moaxham v. Grant* [1900], 1 Q. B. 88. See *ante*, p. 542.

(*v*) See *ante*, p. 560, note (*a*).

the shareholders in reduction of its paid-up capital under the Companies Act, 1880, the directors' powers of making calls are expressly extended to the amount of unpaid capital as augmented by this reduction (x). Bk. III. Chap. 3.
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If a company has power to sell its undertaking, the agreement for sale may provide that the selling company shall make a call, and that the proceeds of the call shall be included in the sale (y). Calls on a sale.

Calls not paid on the day fixed bear interest at rates varying in different companies; in the cases of companies governed by 8 & 9 Vict. c. 16, the rate is 4 per cent., see §§ 23 and 25 (z); and in companies governed by 25 & 26 Vict. c. 89, and Table A., the rate is 5 per cent., see Table A., No. 6. Calls made by cost-book companies may be made to bear interest at 5 per cent. (a). Interest on calls made in winding-up proceedings will be alluded to hereafter. Interest on
unpaid calls.

A company may allow a rebate or discount at a reasonable rate in respect of calls paid before they are due (b). Discount on
calls paid in
advance.

The Companies Act, 1867, allows companies subject to it, if authorised by their regulations as originally framed or as altered, to accept from any members the amount unpaid on any shares held by him either in discharge of a call on other shares held by him or without any call having been made (c). Moreover, companies governed by the Act of 1862 may, if authorised so to do by their regulations, pay interest on monies paid up in advance of calls, and, in a proper case, such interest may be paid out of capital (d). Payment in
advance of calls.

Interest thereon.

3. *Of the manner of making calls.*

In order that a call may impose any obligation on those on whom it is made, it must be made not only by the proper Mode of making
calls.

(x) 43 Vict. c. 19, § 3, and *ante*, p. 563.

(y) *New Zealand Gold, &c., Co. v. Peacock* [1894], 1 Q. B. 622.

(z) The Act says lawful interest. The interest should not be added to the principal and be claimed with it as part of the call. See *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448.

(a) 32 & 33 Vict. c. 19, § 12.

This section also provides that discount not exceeding 5 per cent. may be allowed for punctual payment.

(b) *Ex parte Farquhar* [1896], 2 Ch. 320. See, too, the last preceding note.

(c) 30 & 31 Vict. c. 131, § 24.

(d) Table A., No. 7, *Lock v. Queensland, &c., Mortgage Co.* [1896], A. C. 461; *Dale v. Martin*, 11 L. R. Ir. 371, and *infra*, § 3 of this chapter.

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Irregularities in
making them.

authority, but in the proper manner (e). What is the proper manner varies in different companies, but there are a few rules applicable generally to making calls to which it will be convenient at once to advert.

Except so far as irregularities may have been waived (f), or are cured by some provision in the company's regulations or the Acts by which it is governed (g), it seems that an irregularity in making a call renders it invalid; and an irregularity in giving notice of it precludes the company from enforcing its payment against a person who has not received a proper notice (h). But after judgment has been recovered in an action for a call, such judgment will not be set aside on the ground that the call was improperly made; although the defendant may only have become acquainted with its invalidity since the judgment was obtained against him (i).

The irregularities which are generally relied upon as exonerating a shareholder from the payment of a call may be reduced to two kinds, viz. (1,) those which affect the resolution for the call, and (2,) those which affect the notice requiring payment of a call which has been made. It may be useful to refer to each of these in turn.

Irregular reso-
lution making
call.

1. *As to the resolution making the call.* It has been already seen that the resolution to be valid must be made by those persons with whom the power to make the call lies, and also by a competent number of such persons (k). It has also been seen in an earlier part of the treatise, that what takes place at a meeting improperly convened is not legally valid, and is not binding upon those who have not, by their own acts, precluded themselves from objecting thereto (l). If, therefore, a call can only be made at an extraordinary meeting, specially

(e) In an action for calls, never indebted put in issue the propriety of the manner in which they were made. *South-Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497; *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401; *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

(f) *British Sugar Refining Co.*, 3 K. & J. 408.

(g) See *Dawson v. African Con-*

solidated, &c., Co. [1898], 1 Ch. 6.

(h) See *Miles v. Bough*, 3 Q. B. 845, where the defendant had actually promised to pay the call.

(i) *Thames Haven Dock Co. v. Hall*, 5 Man. & Gr. 274; and *The same Co. v. Rose*, 4 ib. 552.

(k) *Ante*, p. 574.

(l) *Ante*, pp. 422 *et seq.*; and see *Garden Gully Co. v. McLister*, 1 App. Ca. 39.

summoned for the purpose, a call made at a meeting not duly summoned for that purpose will be invalid. But if a call can be made at an ordinary meeting not specially convened, it may also be made at an adjourned ordinary meeting, although such meeting may have been convened specially by a notice not stating the purposes for which it was to be held, and although the notice was not sent to everybody entitled to be present (*m*).

Although the persons making a call may also be required to determine when, where, and to whom the call is to be paid, it is not necessary that they should do this by the resolution making the call. If these particulars are determined by the proper persons, it is sufficient if they are stated in the notices issued in pursuance of such resolution (*n*). If, however, the company's regulations require them to be determined by a resolution, this must be done (*o*).

A call may be made prospectively, *i.e.*, it may be resolved to-day that a call be made a month hence, and be payable a month after that (*p*). So, a call may be made payable by instalments (*q*). But (unless it is necessary to raise the whole capital at once) a power to make calls, as from time to time may be thought necessary, does not authorise those entrusted with the power, in calling up the whole capital at once, and make the same payable by instalments, so as to save themselves the trouble of determining at future periods whether any call shall be made or not (*r*).

It is frequently provided that no call shall be made at less than a certain interval of time since the making of the last call; and considerable difficulty has been felt in determining

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Resolution need not state when, where, or to whom a call is to be paid,

unless required by company's regulations.

Prospective calls.

Intervals between successive calls.

(*m*) See *Wills v. Murray*, 4 Ex. 843; see *ib.* p. 862.

(*n*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574; *Great Northern Rail. Co. v. Biddulph*, *ib.* 243, and compare cases in the next note.

(*o*) *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687; *Cawley & Co.*, 42 Ch. D. 209.

(*p*) See *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*q*) *Ambergate, &c., Rail. Co. v. Norcliffe*, 6 Ex. 629; *Lawrence v. Wynn*, 5 M. & W. 355; *North-Western Rail. Co. v. McMichael*, 6 Ex. 273; *Birkenhead, &c., Rail. Co. v. Webster*, *ib.* 277, overruling *Ambergate, &c., Rail. Co. v. Coulthard*, 5 Ex. 459. As to an action of debt for the recovery of instalments before all are due, see the last three cases.

(*r*) *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

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the exact time at which a call can be said to be made. After some hesitation, the Courts have determined that a call must be considered as made when a resolution that it be made is duly passed (*s*): and this view has been adopted by the legislature so far as regards companies registered under the Companies Act, 1862, and having no special regulations of their own (*t*). Where, therefore, a certain time is required to elapse between the making of two successive calls, that time must be reckoned from the day on which the resolution for the first call is passed, up to the day on which the resolution for the second call is passed (*u*); and if this period is too short, the call will be invalid (*x*); and if the time required to elapse between the calls is so many days at least, neither of the days on which the calls are made ought to be included in the reckoning (*y*).

The resolution making the call must be duly passed; if, therefore, it is necessary to fix the time for payment by a resolution, a call will not be properly made until the time has been so fixed (*z*).

Abandonment
of call.

If a call is made too soon, and is then abandoned, in order to be replaced by another duly made, the irregular call should be declared void before the second is made (*a*).

Winding up.

Provisions in a company's regulations or in the agreement under which the shares were allotted, that the capital shall not be called or paid up except at certain times, or by certain instalments, will not prevent a liquidator in the winding up of the company from making calls whenever necessary (*b*).

Minutes of
meeting making
calls.

A call will not be held invalid simply because the minutes of the meeting making it were signed after the meeting was

(*s*) See *R. v. Londonderry Rail. Co.*, 13 Q. B. 998, and 6 Rail. Ca. 1, sub nomine *Ex parte Tooke*; *Shaw v. Rowley*, 16 M. & W. 810; *Great North of England Rail. Co. v. Bid-dulph*, 7 M. & W. 243. See, as to calls made prospectively, *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*t*) 25 & 26 Vict. c. 89, Table A. No. 5.

(*u*) See generally as to the computation of time, *Railway Sleepers Supply Co.*, 29 Ch. D. 204, and *ante*, p. 423.

(*x*) See the cases in note (*s*), and *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

(*y*) See *Watson v. Eales*, 23 Beav. 294.

(*z*) *Cawley & Co.*, 42 Ch. D. 209. See, too, *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

(*a*) *Welland Rail. Co. v. Berrie*, 6 H. & N. 416.

(*b*) *Cordova Union Gold Co.* [1891], 2 Ch. 580. See, too, *London Provident Socy. v. Morgan* [1893], 2 Q. B. 266.

over (c). In *Cornwall Great Consolidated Mining Company v. Bennett* (d), the question whether a call could be made by a resolution not reduced to writing and signed was raised, but not decided. The judges differed upon that point, but they agreed that there must be some better evidence of the making of a call than a minute neither signed nor confirmed until after the action was commenced.

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Cornwall, &c.
Mining Co. v.
Bennett.

2. *As to the notice that a call has been made.*—Inasmuch as a call is to be considered as made when a resolution that it be made is duly passed, and inasmuch as it would be unjust to any person liable to pay a call to treat him as in default unless he has had notice of the making of a call, it is held that such notice must be given to him before he can be dealt with as a defaulter; and this rule applies not only where notice is expressly required to be given by the company's Act, charter, or deed of settlement, but also where there is no express provision upon the subject, and the shareholder has entered into an absolute covenant to pay such calls as may be made (e). Indeed, in one case it was said, that the notice made the call (f); but this is not in conformity with the rule now established (g).

. Irregular
notice of call.

The notice to be valid must be in such form, if any, as may be required by the regulations of the company; and where a notice is required to be signed by the directors, it will not be sufficient if their signatures are affixed by a clerk (h).

Form of notice.

A notice requiring payment to the account of a person at a particular bank, is equivalent to a notice to pay to that person (i).

A list of persons prepared by a deceased clerk whose business it was to send the notices, and ticked or marked by him so as to show that notices were sent to the persons on the list, is admissible in evidence to prove that a notice was sent to them (k).

Evidence of
notice having
been given.

(c) *Miles v. Bough*, 3 Q. B. 845, and see *ante*, p. 433.

(d) 5 H. & N. 423.

(e) *Miles v. Bough*, 3 Q. B. 845. See, too, *Edinburgh, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *Painter v. Liverpool Gas Co.*, 3 A. & E. 433; and as to cost-book com-

panies, 32 & 33 Vict. c. 19, § 10.

(f) *Shaw v. Rowley*, 16 M. & W. 810.

(g) *Ante*, p. 584, note (e).

(h) See *Miles v. Bough*, 3 Q. B. 845.

(i) *Ibid.* But see *The Leeds Banking Co.*, 1 Ch. 150.

(k) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

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Mode of giving
notice.

In companies
governed by
8 & 9 Vict.
c. 16.

The notice must be given in the manner required by the Act or regulations applicable to each particular company (*l*).

By the Companies Clauses Consolidation Act it is provided (*m*), 1, that twenty-one days' notice at the least shall be given of each call; 2, that no call shall exceed the amount, if any, prescribed by the company's special Act; 3, that successive calls shall not be made at less than the interval, if any, prescribed by the same Act (*n*); 4, that the aggregate amount of calls made in any one year shall not exceed the amount, if any, prescribed by the same Act; and 5, that all calls shall be paid to the persons, and at the times and places, from time to time appointed by the company. Under this Act, therefore, there must first of all be a call made, and then at least twenty-one days' notice of it must be given (*o*), and the notice must state the person to whom, and the place and time at which, the call is to be paid. The twenty-one days are reckoned from and exclusively of the day on which the notice is given (*p*). If the notice states to whom, and when and where, the call is to be paid, it is immaterial whether the resolution for the call does the same or not (*q*).

In companies
governed by the
Act of 1862,
Table A.

By the Companies Act, 1862, it is provided (in Table A.) that the directors may, from time to time, make such calls upon the members, in respect of all monies unpaid on their shares, as they think fit (No. 4); but twenty-one days' notice, at least, must be given of each call (No. 4) (*r*). The notice may be sent by post (No. 95). If a member is dead and the shares are still standing in his name, a notice served on him in accordance with the regulations of the company is sufficient, at all events if the company has no notice of his death (*s*). A

(*l*) See *Watson v. Eales*, 23 Beav. 294. As to notices to deceased members, see *infra*, note (*s*).

(*m*) 8 & 9 Vict. c. 16, § 22.

(*n*) See *Ambergate Rail. Co. v. Mitchell*, 4 Ex. 540.

(*o*) § 136 provides for giving notices by post.

(*p*) *Re Jennings*, 1 Ir. Ch. 654, reversing on this point, *ib.* 236; and see generally on the computation of time, *Railway Sleepers Supply Co.*,

29 Ch. D. 204, and *ante*, p. 423.

(*q*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574; *Great Northern Rail. Co. v. Biddulph*, *ib.* 243.

(*r*) A notice by a company, which has changed its name since the call was made, may be given in the new name, *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

(*s*) *New Zealand, &c., Co. v. Peacock*

call is made at the time when the resolution of the directors authorising it is passed (No. 5). It seems that the resolution making the call must fix the time of payment, and that a valid call has not been made until this has been done (t). Bk. III. Chap. 3.
Sect. 2.

The Act makes calls specialty debts (§ 16) (u), and gives a short form of pleading in an action for their recovery (§ 70).

By the Stannaries Act, 1869 (x), it is provided that calls may be made at any meeting of the company with special notice (§ 10) (y), which may be either given personally or sent by post (§ 8). In companies
governed by the
Stannaries Act,
1869.

The Act does not make calls specialty debts (§ 13), but gives a short form of pleading for their recovery.

4. *Of the persons liable to pay calls.*

In order that a person may be liable to pay a call, meaning thereby a portion of the unpaid-up capital of a company (z), he must either have agreed to subscribe to such capital, or he must have become a shareholder in the company, or, thirdly, his liability must have devolved upon him as the representative of a subscriber or a shareholder. It will be convenient to allude—1, to subscribers; 2, to shareholders; 3, to the representatives of subscribers and shareholders. Persons to pay
calls.

1. *As to subscribers.*—There is no principle of common law which prevents a subscriber to an undertaking from being liable to calls before he has become an actual shareholder in the company he has agreed to join. His liability at common law depends entirely on the contract into which he has entered. But by several of the statutes relating to companies, a particular 1. Calls on
subscribers.

[1894], 1 Q. B. 622. If his death be known, *qu.* if it is necessary to send notice. *Allen v. Gold Reefs, &c., Ltd.* [1900], 1 Ch. 656, at p. 670. See, also, *James v. Buena Ventura, &c., Syndicate* [1896], 1 Ch. 466.

(t) See *Cawley & Co.*, 42 Ch. D. 209; *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687. Compare cases in note (q).

(u) The liability to pay calls under this section is not a debt until a call has been made. *Whittaker v. Ker-*

shaw, 45 Ch. D. p. 326.

(x) 32 & 33 Vict. c. 19.

(y) § 5 provides that 7 clear days' notice must be given of such meetings.

(z) Every sum which a member may be liable under the company's regulations to pay if called upon is not necessarily a portion of the company's capital. See in the case of a company limited by guarantee and having no share capital, *Baird's case* [1899], 2 Ch. 593.

Bk. III. Chap. 3.
Sect. 2.

mode of proceeding for the recovery of calls is pointed out ; and if that mode of proceeding applies, as it frequently does, to shareholders only (or their representatives), a person who is a mere subscriber as distinguished from a shareholder, cannot be made to pay a call by that particular mode of proceeding (a), whatever obligation he may have incurred by agreeing to take shares and to contribute his quota of capital (b).

Subscribers to
companies go-
vernied by
8 & 9 Vict.
c. 16.

By the Companies Clauses Consolidation Act, it is expressly declared that calls may be made on the subscribers as well as on the shareholders (c) ; and as was seen in an earlier part of the work, subscribers may be registered as shareholders without any express consent on their part, and when registered they may be sued as shareholders for calls (d). But an allottee of shares who is not a subscriber, i.e., who has not executed any instrument binding himself to contribute towards the capital of the company (e), cannot be sued for calls under the Act in question (f).

Subscribers to
companies go-
vernied by the
Act of 1862.

A person who subscribes the memorandum of association of a company to be registered under the Companies Act of 1862, becomes on the registration of the memorandum a member by virtue of § 23 of the Act, and liable to pay the amount of the shares for which he has subscribed as and when called upon (g).

Under the Companies Act, 1862, Table A., calls are only authorised to be made on the members (h).

2. Calls on
shareholders.

2. *As to shareholders.*—Who are shareholders, the effect of being on or off the register of shareholders, the effect of acting

(a) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17 ; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

(b) For instances of successful actions against allottees on the contracts entered into by them, see *Duke v. Forbes*, 1 Ex. 356 ; *Duke v. Dive*, ib. 36 ; *Aldham v. Brown*, 7 E. & B. 164, affirmed on appeal, 6 Jur. N. S. 41.

(c) 8 & 9 Vict. c. 16, §§ 21, 22.

(d) See, accordingly, *Mid. Rail. Co. v. Gordon*, 16 M. & W. 804 ; *Cork and Youghal Rail. Co. v. Pater-*

son, 18 C. B. 414, *ante*, p. 146.

(e) *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

(f) *Carmarthen Railway Co. v. Wright*, 1 Fos. & Fin. 282 ; *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279.

(g) See *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56, and *ante*, p. 569, note (r).

(h) 25 & 26 Vict. c. 89, Table A., No. 4 ; and as to who are members, see § 23 of the Act, and *ante*, pp. 163 *et seq.*

as a shareholder without being one,—are matters which were discussed in Book I. Chap. 2. In the present place, therefore, it is proposed merely to recapitulate, as shortly as possible, the results formerly arrived at, so far as they relate to the particular question of liability for calls.

Bk. III. Chap. 3.
Sect. 2.

A person who has never become a shareholder in the proper sense of the word, and who is not estopped by his own conduct from denying that he is a shareholder, is not liable to calls as a shareholder, although he may have been registered as one (i). Where a trustee is the person registered as a shareholder, his *cestui que trust* is not liable to the company for calls (k); and as a general principle, there must be some special ground for holding that a person who has no right as against a company to share profits, is compellable by the company to pay calls (l).

Person must be
a shareholder,

At the same time, whether a person is actually a shareholder in a company or not, if he is estopped by his own conduct from denying that he is a shareholder, he cannot escape from the payment of calls properly made: and upon the ground of estoppel by conduct, subscribers to companies have frequently been held liable to calls as shareholders, although they had not complied with all the formalities necessary to render them shareholders in the strict sense of the word (m).

or be estopped
from denying
that he is one.

(i) *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Foa. & Fin. 282; *New Brunswick, &c., Rail. Co. v. Muggeridge*, 4 H. & N. 160, and 580. See, also, *Bloxam v. Metropolitan Cab Co.*, 4 N. R. 51, where an injunction was granted.

(k) Not even in equity, see *Newry Rail. Co. v. Moss*, 14 Beav. 64; and *infra*, p. 596, note (m).

(l) *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401.

(m) *Hull Flax Co. v. Wellesley*, 6 H. & N. 38, where the shares were issued irregularly; *Cromford, &c., Rail. Co. v. Lacey*, 3 Y. & J. 80; *Burnes v. Pennell*, 2 H. L. C.

497; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham, &c., Rail. Co. v. Daniel*, 2 Q. B. 281; *London Grand Junction Rail. Co. v. Graham*, 1 ib. 271; *Birmingham, Bristol, &c., Rail. Co. v. Locke*, ib. 256, in all of which the calls were recovered. Compare these with *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598, in which they were not, and *Wolverhampton New Waterworks Co. v. Hawksford*, 6 C. B. N. S. 336; 7 ib. 795; and 11 ib. 456, where an action for calls was partly successful and partly not. The defendant was held liable for calls made on shares properly issued and held by him, although there was no properly sealed register of

Bk. III. Chap. 3.
Sect. 2.

Persons who are
shareholders
liable to calls.

A person who is a shareholder within the meaning of an Act of Parliament which authorises calls to be made on shareholders, is liable to calls made in pursuance of the Act, although if his liability had not depended on statutory provisions, he might have been able to resist payment. Upon this ground it is that infant shareholders in railway companies are liable to calls (*n*), if they do not repudiate their shares (*o*). So, a person who is a shareholder, and is as such under a statutory liability to pay calls, cannot escape from such liability on the ground that he was induced to become a shareholder by the fraud of the company; he must go further and show a repudiation of his shares, and that he is not in truth a shareholder (*p*); fraud and timely repudiation, however, afford a defence (*q*). Again, in the case of a registered joint-stock company, the company being actually created by registration, and having when created all the powers conferred upon properly constituted companies, a call upon its shareholders will be valid, although the company ought not to have been registered; and a shareholder in such a company cannot escape from his liability to pay the call, upon the ground that things required to be done before registration have never been done at all (*r*). So, in the case of a company incorporated by a special Act, it is no answer to a call that the Act was obtained by fraud (*s*).

Duration of
shareholder's
liability to calls.

A person who, by being a shareholder, has once become liable to pay calls, continues to be so liable until he has ceased

shareholders; but he was held not liable for calls on shares not numbered or distinguished from each other, and in respect of which there was in truth no register at all. See *ante*, p. 144; and *qu.* whether this case can be relied upon after *Portal v. Emmens*, 1 C. P. D. 201 and 664.

(*n*) *Cork and Bandon Rail. Co. v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Rail. Co. v. Fearnley*, 4 Ex. 26; *North-Western Rail. Co. v. McMichael*, 5 Ex. 114. Compare *Birkenhead, &c., Rail. Co. v. Pilcher*, 5 Ex. 121.

(*o*) *Newry, &c., Rail. Co. v. Coombe*,

3 Ex. 565; *Dublin and Wicklow Rail. Co. v. Black*, 8 Ex. 181.

(*p*) *Deposit Life Assur. Co. v. Ayscough*, 6 E. & B. 761. As to giving particulars of the fraud, see *McCreight v. Stevens*, 1 H. & C. 454.

(*q*) *Bolch-y Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324. See Bk. I., c. 3, as to rescinding contracts for fraud.

(*r*) *Banmoen Iron Co. v. Barnett*, 8 C. B. 406. See, too, *Agricultural Cattle Insur. Co. v. Fitzgerald*, 16 Q. B. 432.

(*s*) See *Waterford, &c., Rail. Co. v. Logan*, 14 Q. B. 672.

to be a shareholder, or until some valid agreement has been made between him and the company by virtue of which the company is precluded from treating him any longer as liable to pay calls (*t*). If any such agreement has been made, it will afford a defence (*u*), although all the formalities required to be observed by out-going shareholders may not have been rigorously complied with (*x*).

Bk. III. Chap. 3.
Sect. 2.

In most companies, shares are not transferable, so long as the owner is indebted to the company for calls (*y*). Where this is the case, a person who has sold his shares, must pay all the calls made whilst the shares are registered in his name, before he or the purchaser can require the company to accept the latter as a shareholder in respect of the shares he has purchased (*z*); and so long as the purchaser is not a shareholder, the vendor continues to be one, and to be liable to calls (*a*).

When shares
have been sold.

Shares are not unfrequently sold after a call has been made and before it has become payable; and if in such a case the purchaser is accepted as a shareholder by the company, it may possibly find itself unable to sue either the vendor or the purchaser for the call after the time for its payment has elapsed. In *The Aylesbury Railway Company v. Mount* (*b*), which was a case of this sort, turning on the provisions of a special Act of Parliament, the Court of Common Pleas held, that the call could not be recovered from the transferor, and the Court of Queen's Bench held that it could not be recovered from the transferee (*c*); for the transferor was not a shareholder when the call became payable, and the transferee was not a share-

Effect of sale
after call is
made, but before
it is payable.

Aylesbury Rail.
Co. v. Mount.

(*t*) See the cases of *Bosanquet v. Shortridge*, 4 Ex. 699; *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24, noticed *ante*, pp. 73, 74.

(*u*) *Plate Glass Co. v. Sunley*, 8 E. & B. 47. The validity of the defendant's retirement in this case was admitted by the demurrer.

(*z*) See *Bargate v. Shortridge*, and *Taylor v. Hughes*, *ante*, pp. 73, 74.

(*y*) The subject of the transfer of

shares will be alluded to hereafter.

(*z*) *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 17 ib. 645.

(*a*) See *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674; *Humble v. Langston*, 7 M. & W. 517.

(*b*) 4 Man. & Gr. 651; reversed, but on purely technical grounds, 7 Man. & Gr. 898.

(*c*) *Aylesbury Rail. Co. v. Thompson*, 2 Ra. Ca. 668.

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holder when it was made; and the Act in question was so worded as to render those only liable to be sued for calls who were shareholders at both those times. The Courts will not, however, so construe an Act as to deprive the company of all remedy for the recovery of a call, if they can possibly avoid it; and as the obligation to pay is created by the making of a call, the person who was the shareholder when a call was made, is *primâ facie* the person to pay it, whatever he may since have done with his shares.

North American
Colonial Assoc.
v. Bentley.

In *The North American Colonial Association of Ireland v. Bentley (d)*, a company was incorporated by a special Act, which provided for making calls on shareholders, and enacted that if at the time appointed for payment of a call, the holder failed to pay it, the company might sue such shareholder, and that it should be sufficient in an action for calls, to prove that the defendant was a shareholder at the time the call was made. The Act also declared that shareholders who had sold their shares should remain liable for all future calls until transfers had been delivered to the secretary, and that no shareholder should be entitled to transfer his share until he should have paid all calls due upon it. Upon these somewhat conflicting enactments, it was held, that a shareholder who had transferred his shares after a call had been made, but before it had become payable, was liable to be sued for the call; and it was considered clear that the transferee could not be sued for it, although the transfer had been delivered to the secretary of the company as contemplated by the Act.

Watson v. Eales.
Cost-book
company.

Again, in *Watson v. Eales (e)*, which was the case of a cost-book mining company, one of the rules was, that no share should be transferred until all calls upon it were paid: and it was held that a transferee of shares in respect of which calls were in arrear, was not liable for such calls to the company, and that the company having recognised the transfer, could not forfeit the shares for non-payment of the calls.

Result of the
cases.

In the present state of the law, it cannot be said that there is any general rule determining whether the transferor or the transferee of a share is liable to the company for calls made,

(d) 15 Jur. 187, Q. B.

(e) 23 Beav. 294.

but not paid before the transfer; for admitting the tendency to be in favour of holding the transferor liable, the statutory provisions generally applicable to the subject, are by no means uniform.

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Sect. 2.

Under the Companies Clauses Act (*f*), and the Stannaries Act, 1869 (*g*), the person liable is the shareholder at the time of making the call.

Statutory enactments on this subject.

This also appears to be the case with respect to companies governed by the Companies Act, 1862, Table A. (*h*).

The right to forfeit shares for non-payment of calls, or for other reasons, will be examined hereafter (*infra*, c. 6), but it may be observed here, that both the Companies Clauses Consolidation Act and the Companies Act, 1862, Table A., provide that an action for calls may be maintained, although the shares in respect of which they became due, have been forfeited for their non-payment (*i*). Where this double remedy is not expressly given, it will not be presumed; and in such a case forfeiture will be an answer to an action (*k*), provided the forfeiture was in all respects legal, but not otherwise (*l*).

Forfeiture of shares for non-payment of calls.

3. *As to the representatives of subscribers and shareholders.*—In adverting to the liability of the executors of a deceased person to pay calls (*m*), it is necessary to distinguish calls made before, from those made after the testator's death. Calls made before his death are payable out of his estate (*n*); and as to companies governed by the Companies Clauses Consolidation Act, or the Companies Act, 1862, rank like ordinary specialty debts (*o*). Calls made after his death, are also payable out of

3. Calls on the representatives of subscribers and shareholders.

(*f*) 8 & 9 Vict. c. 16, §§ 26, 27. *Belfast, &c., Rail. Co. v. Strange*, 1 Ex. 739; *Birkenhead, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426; *Wilson v. Birkenhead, &c., Rail. Co.*, 6 Ex. 626; *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 17 ib. 645. As to who is a shareholder, see *ante*, p. 143.

(*g*) 32 & 33 Vict. c. 19, § 13.

(*h*) See 25 & 26 Vict. c. 89, § 70, and Table A., No. 4; but see, also, No. 6, which throws some doubt on the point as to who is a member.

L.C.

See *ante*, pp. 163, 176.

(*i*) 8 & 9 Vict. c. 16, § 29; 25 & 26 Vict. c. 89, Table A., No. 21. See *Great Northern Rail. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern Rail. Co.*, 1 Macqueen, 112, and *infra*, c. 6.

(*k*) See *Giles v. Hutt*, 3 Ex. 18.

(*l*) See *Edinburgh, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707.

(*m*) As to notices, see *ante*, p. 586, note (*s*).

(*n*) *Fyler v. Fyler*, 2 Ra. Ca. 813.

(*o*) As to 8 & 9 Vict. c. 16, see

Bk. III. Chap. 8.
Sect. 2.

his estate, if they are made whilst the shares are left in his name, and if he entered into any contract whereby he undertook to pay such calls as might be made upon his shares (*p*). In order that this liability may attach to the estate of a deceased shareholder, it is not necessary that his executors should become shareholders in respect of his shares, or that they should have been named in the contract sought to be enforced against them (*q*).

Proof against
insolvent estate.

The company may prove in the administration of the estate of a deceased shareholder whose estate is insolvent, for the estimated value of the liability to future calls in respect of the shares standing in his name (*r*).

Calls not payable
by executors
personally.

By the Companies Clauses Consolidation Act it is expressly declared, that the executors of subscribers and shareholders shall pay the calls payable in respect of their testators' shares (*s*); but this only means that the executors are to pay out of their testators' assets; and unless they have actually become shareholders themselves, they must be sued as executors, and not as shareholders, for such calls as may be sought to be recovered from them (*t*). As a general rule it may be taken, that executors are never liable otherwise than in their representative capacity, unless they actually become shareholders (*u*).

Unless they are
themselves
shareholders.

But if they do become shareholders they become subject to the same obligations as other shareholders, and as between themselves and the company they are personally liable to calls, whatever the state of their testators' assets may be (*x*).

Trustees in
bankruptcy.

If a shareholder becomes bankrupt, calls made before his bankruptcy are provable against his estate; and under the

Cork and Bandon Rail. Co. v. Goode, 13 C. B. 826; and as to 25 & 26 Vict. c. 89, see § 16. As to companies governed by the Stannaries Act, 1869, see § 13 of that Act; and as to other companies, see *Robinson's case*, 6 De G. M. & G. 572. Specialty debts now rank with simple contract debts, 32 & 33 Vict. c. 46.

(*p*) *Heward v. Wheatley*, 3 De G. M. & G. 628; *Fyler v. Fyler*, 2 Ra. Ca. 813; *Wills v. Murray*, 4 Ex. 843; *Blount v. Hopkins*, 7 Sim. 51.

(*q*) *Ibid*, and see *Baird's case*, 5

Ch. 725.

(*r*) *Fuller v. McMahon* [1900], 1 Ch. 177.

(*s*) 8 & 9 Vict. c. 16, § 21.

(*t*) *Birkenhead, &c., Rail. Co. v. Cotesworth*, 5 Ex. 226.

(*u*) *Buchan's case*, 4 App. Ca. 549, 583; *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. 800.

(*x*) See *Armstrong v. Burnet*, 20 Beav. p. 435; *Spence's case*, 17 Beav. 203; *Duff's Executors' case*, 32 Ch. D. 301; *Buchan's case*, 4 App. Ca. 549 and 583.

Bankruptcy Act, 1883 (*y*), his liability to future calls is also provable. Therefore, his order of discharge is a bar to all calls; even although the trustee in bankruptcy may neither sell the shares nor disclaim them (*z*).

Bk. III. Chap. 3.
Sect. 2.

5. Actions for calls.

An action for calls must be brought in the name of the company, if it is incorporated; and in the name of the public officer if the company is empowered to sue its shareholders in that manner (*a*). In cost-book companies the amount of an unpaid call is deemed to be a debt due from the shareholder to the company for which the company might formerly sue in the name of the purser (*b*); but purser's suits appear to have been abolished (*c*); the action, therefore, should now be brought in the name of the company (*d*).

Actions for
calls.

Several of the modern Acts of Parliament relating to companies contain provisions having for their object the simplification of pleading and proof in actions for calls (*e*). Their general effect is to render it necessary for a statement of claim in an action for calls to state merely that the defendant, as a shareholder, is indebted to the company in so much money for calls, omitting all statements respecting the making of the calls in question (*f*). As regards proof, the general

Statutory
enactments.

(*y*) 46 & 47 Vict. c. 52, § 37.

(*z*) § 55, and *infra*, c. 8.

(*a*) *Chapman v. Milvain*, 5 Ex. 61; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Lawrence v. Wynn*, 5 M. & W. 355; *Smith v. Goldsworthy*, 4 Q. B. 430. See a declaration in an action for calls, by a company incorporated by the Canadian legislature, *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

(*b*) 32 & 33 Vict. c. 19, § 13.

(*c*) See County Court (Stannaries Jurisdiction) Rules, 1897, r. 5. Incorporated into County Court Rules as Order Lc. r. 5, and *ante*, p. 379.

(*d*) *Ante*, p. 384, and as to pro-

ceedings in bankruptcy, *Ex parte Ashmead* [1893], 1 Q. B. 590.

(*e*) See 8 & 9 Vict. c. 16, §§ 26-28; 25 & 26 Vict. c. 89, § 70; and as to cost-book mining companies, 32 & 33 Vict. c. 19, § 13. See the form of statement of claim in R. S. C., Appx. C., § 4, No. 9. Where the writ is specially endorsed, see *Gold Ores Reduction Co. v. Parr* [1892], 2 Q. B. 14; *Westmoreland, &c., Slate Co. v. Feilden* [1891], 3 Ch. 15.

(*f*) See, as to the necessity of adopting the statutory forms, *Wolverhampton, &c., Waterworks Co. v. Hawkesford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; *Dundalk*,

Bk. III. Chap. 3. Sect. 2. effect of the provisions referred to is to render it necessary to show merely three things: viz., first, that the calls sued for were made in point of fact; secondly, that the defendant was a shareholder when the call was made (g); and, thirdly, that he has had proper notice of the making of the call.

Time for bringing action. Calls made payable by statute (h), or by deed, are specialty debts; and an action for their recovery is not, therefore, barred by the lapse of less than twenty years (i).

When company is being wound up. In the case of a company which is being wound up under the Companies Acts, an action may be brought to recover a call made before the winding up, notwithstanding that a balance order has been made in the winding up for the amount of the call (k).

Defences. The usual grounds of defence to an action for calls have all been considered. They may be reduced to:—

1. A denial that the defendant is a person liable to pay the call (l). The *cestui que trust* or principal of a shareholder is not liable to such an action (m). But a married woman may be sued for calls on shares standing in her own name (n).

2. A denial of the making of the call in point of fact.

3. A denial that the call, admitted to have been made in point of fact, was authorised (o), was made by competent

dec., *Rail. Co. v. Tapster*, 1 Q. B. 667; *Newport, dec., Rail. Co. v. Hawes*, 3 Ex. 476; *Wilson v. Birkenhead, dec., Rail. Co.*, 6 Ex. 626, and as to actions against executors, *Birkenhead, dec., Rail. Co. v. Cotesworth*, 5 Ex. 226.

(g) See, as to this, *ante*, pp. 587 *et seq.*

(h) Calls made under a colonial Act are simple contract debts only. See *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(i) *Cork and Bandon Rail. Co. v. Goode*, 13 C. B. 826. Compare *Robinson's case*, 6 De G. M. & G. 572.

(k) *Westmoreland, dec., Slate Co. v. Feilden* [1891], 3 Ch. 15. As to balance orders, see *infra*, Bk. IV., c. 1, § 14.

(l) See *ante*, pp. 587 *et seq.*, and as

to estoppel by conduct, *ante*, p. 589.

(m) *Newry Rail. Co. v. Moss*, 14 Beav. 64. As to a trustee's right to indemnity, see *Hardoon v. Belilios* [1901], A. C. 118. As to who may be sued for contributions in respect of insurances effected by a member of a mutual insurance society, see *United Kingdom Mutual Ass. Assoc. v. Nevill*, 19 Q. B. D. 110; *Montgomerie v. United Kingdom Mutual Ass. Assoc.* [1891], 1 Q. B. 370; and compare *Great Britain, dec., Ins. Assoc. v. Wyllie*, 22 Q. B. D. 710; *Ocean Iron, dec., Ins. Assoc. v. Leslie*, *ib.* p. 722, note, and *British Marine Mutual Ins. Co. v. Jenkins* [1900], 1 Q. B. 299.

(n) See 45 & 46 Vict. c. 75, §§ 1, 6, 9, and *ante*, pp. 58, 59.

(o) *Ante*, p. 581.

persons (*p*), or in the proper manner (*q*), or for proper purposes (*r*). Bk. III. Chap. 3.
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4. A denial of any notice of the call.

5. A denial of such notice as the defendant was entitled to receive (*s*).

6. Set off (*t*).

7. Infancy (*u*).

8. Fraud (*x*).

It must be borne in mind, that if a shareholder does not avail himself of such defence as he may have at the proper time, he will be precluded from afterwards disputing either the validity of the call, or his liability to pay it (*y*).

Evidence of the making of a call is usually given by proving the resolution by which it was made; and this may be done either by the testimony of the company's secretary, or some other person having actual knowledge of the fact, or by the company's minute books, which, as was seen in a former chapter, are in many cases made admissible as evidence of the facts stated in them (*z*). Evidence,
of the making
of the call,

Evidence that the defendant was a shareholder is usually given by the production of the company's register, the effect of which has been considered already (*a*). of membership,

Evidence that the defendant received due notice of the making of the call must be given by showing that the requisite advertisements (if any) were published, and that such notice as he was entitled to receive either actually reached him, or of notice of
the call.

(*p*) *Ante*, p. 574.

(*q*) *Ante*, p. 581.

(*r*) *Ante*, p. 575.

(*s*) *Ante*, p. 585. In an action for calls against a contributory of a limited company being wound up voluntarily, it is no defence that the defendant had no notice that his name was placed upon the list of contributories, see *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175.

(*t*) *Ante*, p. 387, and *infra*, under Winding-up. As to setting off calls not yet due where a shareholder sues a company, *Ryland v. Delisle*,

L. R. 3 P. C. 17. Compare *Kent's case*, 39 Ch. D. 259; and as to setting off calls in respect of director's qualification shares against money due for remuneration, see *Salton v. New Beeston Cycle Co.* [1899], 1 Ch. 775.

(*u*) *Ante*, pp. 55, 590.

(*x*) *Ante*, p. 590, and *Smith v. Reese River Co.*, 2 Eq. 264.

(*y*) See *Thames Haven, &c., Co. v. Hall*, 5 Man. & Gr. 274; *Thames Haven, &c., Co. v. Rose*, 4 ib. 552.

(*z*) See *ante*, p. 432.

(*a*) See *ante*, pp. 74, 144, and 165.

Bk. III. Chap. 3. Sect. 3. was so sent to him as to have probably reached him. This will be sufficient, in default of evidence that what was so sent him did not reach him (b).

SECTION III.—OF DIVIDENDS.

By a dividend is ordinarily meant that share of a company's profits which is payable to its members in respect of their shares. The proper fund for the payment of dividends is the excess of a company's earnings over the expenses incurred in obtaining them. But it is obvious that opinions may differ as to the items which ought to be taken into consideration in settling the two sides of the account, the balance of which may be properly divided as profit (c).

The power of settling questions of this kind is generally entrusted to the directors, with or without the sanction of the shareholders; and (subject to any special provision to the contrary, and to the limits placed on all powers of directors and shareholders by the doctrines of *ultra vires*) if there be a difference of opinion the voice of the majority must prevail. The majority can decide whether a dividend shall be paid before some particular debt is discharged (d), or before sums are set aside to meet contingencies (e); or before certain works are finished (f); and what losses and expenses ought to be treated as ordinary and payable out of current receipts; and, excluding cases in which it is obvious that a particular debt or outlay cannot reasonably be charged to capital, what as extraordinary and payable out of capital or money borrowed (g). These are questions for business men to decide,

(b) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

(c) See *Bridgewater Navigation Co.* [1891], 1 Ch. 171; *National Bank of Wales, Ltd.* [1899], 2 Ch. 629; affirmed *sub. nom. Dovey v. Cory* [1901], A. C. 477.

(d) *Stevens v. South Devon Rail. Co.*, 9 Ha. 326; *Corry v. Londonderry, &c., Co.*, 29 Beav. 263.

(e) *Fisher v. Black and White Pub-*

lishing Co. [1901], 1 Ch. 175; *Burland v. Earle*, Times, 11 Nov., 1901. See, too, as to the meaning of "profits available for dividend," [1901], 1 Ch. 175.

(f) *Broune v. Monmouthshire, &c., Co.*, 13 Beav. 32.

(g) See *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales, Ltd.* [1899], 2 Ch. 629; *Gregory v. Patchett*, 33 Beav. 595.

but the power of deciding them cannot be lawfully exercised for the dishonest purpose of making it appear that profits have been made, when in truth there has been a loss (*h*) ; *e.g.*, when the current receipts have been less than the current expenses.

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Under ordinary circumstances, and in the absence of any agreement to the contrary, monies earned ought to be treated as profits of the year in which they are paid, and not as profits of the year in which they are earned (*i*) ; and in ascertaining the profits of a company for the purpose of making a dividend, debts incurred in the ordinary course of business ought to be deducted, but not debts incurred by exercising special powers of borrowing (*k*). Assets, moreover, may be honestly estimated at a value which they may never realise (*l*). It has also been held that dividends may be paid by a company before its works are finished (*m*), and although its debts may be unpaid. The creditors of a company may be willing to allow their principal monies to continue unpaid, provided they are punctually paid the interest upon them ; and if a company, after defraying all current expenses and the interest of its debts has a surplus arising from its current receipts, there is no principle either of law or morality which requires that such surplus shall be accumulated, or forbids its division as profit amongst the shareholders. Whether dividends shall be paid whilst debts remain unpaid, or whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided, are questions which, subject to any restrictions or directions contained in the company's regulations, it is competent for the majority of shareholders to decide (*n*).

Cases where dividends have been held not improper.

As a general rule, interest on debts, whether in the form of loan capital or otherwise, must undoubtedly be charged against revenue ; it was, however, held in one case that a company

Interest during construction of works.

(*h*) *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales, Ltd.* [1899], 2 Ch. 629 ; *Bloxam v. Met. Rail. Co.*, 3 Ch. 337.

(*i*) See *per* Turner, L.J., in *Mac-laren v. Stainton*, 3 De G. F. & J. 214. Compare *Browne v. Collins*, 12 Eq. 586.

(*k*) *Corry v. Londonderry Co.*, 29 Beav. 263.

(*l*) *Stringer's case*, 4 Ch. 475 ; *Rance's case*, 6 Ch. 104 ; *Ex parte Kemp* [1894], 3 Ch. 690.

(*m*) *Browne v. Monmouthshire, etc., Rail. Co.*, 13 Beav. 32.

(*n*) *Burland v. Earle*, Times, 11 Nov., 1901 ; *Stevens v. South Devon Rail. Co.*, 9 Ha. 313 ; *Corry v. Londonderry Co.*, 29 Beav. 263.

Bk. III. Chap. 3. which had borrowed money for the construction of large works
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properly chargeable to capital, was entitled to treat the interest on such money during construction as part of the capital cost of the works, and to pay dividends in the meantime out of its current earnings without making any deduction therefrom in respect of such interest (o) ; but the propriety of this decision is open to doubt (p).

Expenses of
formation.

Expenses incidental to the formation of a company are frequently paid off by instalments spread over a number of years, dividends being paid in the meanwhile (q) ; and if this is done openly, there seems to be nothing illegal in it.

Payment of
dividends not-
withstanding
loss of capital.

The question under what circumstances a limited company may pay dividends notwithstanding a loss of capital has been much discussed in recent years, and it is very difficult, if not impossible, to lay down any general principle which will apply to all cases ; the question is one as much for business men as for lawyers, and each case must to a great extent depend upon the circumstances peculiar to it (r). It is, however, established that in some cases dividends may be paid out of current profits, although the company's paid-up capital is no longer represented by assets of equivalent value. Thus, if the articles allow it, dividends may be paid by a limited company if its income exceeds its expenditure, although its whole capital may have been sunk in obtaining wasting property, e.g., a leasehold mine, and although no provision has been made for replacing the capital which is wasting away (s). Indeed it has been said that "fixed capital may be sunk and lost and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and

(o) *Bardwell v. Sheffield Waterworks Co.*, 14 Eq. 517. Note that Malins, V.-C., allowed dividends on preference shares to be charged to capital ; this is clearly inconsistent with the authorities mentioned *infra*, p. 602, note (h).

(p) See *Bloxam v. Met. Rail. Co.*, 3 Ch. 337, and *Bosanquet v. St. John, &c., Mining Co.*, 77 L. T. N. S. 206.

(q) See *per* Martin, B., in *Bale v. Cleland*, 4 Foa. & Fin. 144. See, also, *Bardwell v. Sheffield Waterworks Co.*, 14 Eq. 517, and Table A., No. 80.

(r) See *Dovey v. Cory* [1901], A. C. p. 488 ; *National Bank of Wales* [1899], 2 Ch. pp. 669 *et seq.*

(s) *Lee v. Neuchatel Asphalte Co.*, 41 Ch. D. 1.

form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law" (t). It was upon this principle that payment of dividends was permitted in *Verner v. General and Commercial Investment Co.* (u), and *Wilmer v. Macnamara & Co.* (x), notwithstanding a depreciation in value of the company's assets. But even this statement must be applied with caution, and may need modification, if a definite portion of the company's fixed capital has been actually lost (y), and the so-called profits cannot be fairly regarded as such. Moreover, attention must in each case be paid to the provisions of the company's articles of association (z).

Dividends may also be paid, if the regulations of the company allow it, out of the profit arising from the realisation of part of the company's capital (a), provided that the whole accounts, when fairly and properly taken, show that such profit has been made (b).

Expenses properly chargeable to capital, but paid out of income, may afterwards be charged to capital so as to increase a dividend. In other words, the income account may in such a case be recouped by the capital account, and the two accounts be set right by paying a dividend out of capital (c).

But except in a case of this sort payments out of capital cannot be profit; and to pay what are called profits or dividends out of capital is, under whatever disguise, tantamount to returning so much capital to the shareholders to

(t) *Per* Lindley, L. J., *Verner v. General and Commercial Investment Trust* [1894], 2 Ch. 239.

(u) [1894], 2 Ch. 239.

(x) [1895], 2 Ch. 245. See, too, *Bolton v. Natal Land Co.* [1892], 2 Ch. 124; *Orichton's Oil Co.* [1901], 2 Ch. 185, and *Barrow Haematite Steel Co.* [1900], 2 Ch. 346, affirmed [1901], 2 Ch. 746, see *ante*, p. 559, note (z).

(y) See *Dovey v. Cory* [1901], A. C., p. 491, *per* Lord Davey. See, too, *Ebbw Vale Steel, Iron, and Coal Co.*, 4 Ch. D. 827.

(z) Compare the provisions as to dividends on preference shares with

those as to dividends on ordinary shares in *Dent v. London Tram. Co.*, 16 Ch. D. 344, and *Davison v. Gillies*, ib. 347, note, and Buckley on the Companies Acts, 7th ed., p. 556.

(a) *Lubbock v. British Bank of South America* [1892], 2 Ch. 198; and *Verner v. General and Commercial Trust* [1894], 2 Ch. p. 265.

(b) *Foster v. New Zealand Lake Asphalt Co.* [1901], 1 Ch. 209.

(c) *Mills v. North Rail. of Buenos Ayres Co.*, 5 Ch. 621, and *Bishop v. Smyrna and Cassaba Ry. Co.* [No. 2] [1895], 2 Ch. 596. Compare *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

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Profits from
accretions to
capital.

Recoupment of
revenue out of
capital.

Dividends paid
out of capital.

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whom such payments are made. In ordinary partnerships there is nothing to prevent the partners from withdrawing and diminishing their capitals wholly or in part if they all think proper to do so; nor is there any legal reason why partners should not, if they please, borrow money on the credit of the firm, and divide it wholly or in part among themselves. But neither course could be pursued without the consent of all the partners. With respect to companies, however, there are reasons why capital and money borrowed should not be applied in making payments to shareholders, even although they may all consent. In the first place, such an application of the money is calculated to deceive the public, and can hardly be made for any honest purpose; and in the next place, capital raised, or money borrowed, in order to carry on the business of the company, cannot be properly applied for such a wholly different purpose as that of paying dividends to the shareholders (*d*). Even if all the shareholders can render such a course legal, a majority cannot; and the more difficult theoretical question whether all can is of little practical consequence (*e*). With respect, indeed, to companies governed by the Companies Clauses Consolidation Act (*f*), or by the Table A. to the Companies Act, 1862 (*g*), payment of dividends otherwise than out of profits is expressly prohibited, and will be restrained by injunction (*h*). Nay, more, articles of association providing for the payment by limited companies of dividends (*i*), or of interest on their share capital in the nature of dividends (*k*) out of capital are invalid, and the directors will be restrained from acting under them. Such a payment could

(*d*) See *ante*, p. 442.

(*e*) See *Flitcroft's case*, 21 Ch. D. 519; *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528; *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *James v. Eve*, L. R. 6 H. L. 335.

(*f*) 8 & 9 Vict. c. 16, § 121.

(*g*) Table A., art. 73.

(*h*) See *ante*, note (*e*), and *Dent v. London Tramways Co.*, 16 Ch. D. 344; *Davison v. Gillies*, *ib.* 347 n.; *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337; *Hoole v. Great Western*

Rail. Co., *ib.* 262; *Holmes v. Newcastle, &c., Abbattoir Co.*, 1 Ch. D. 682. Compare *Bardwell v. Sheffield Waterworks Co.*, 14 Eq. 517, and *ante*, p. 600, note (*o*).

(*i*) *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. Compare *Dent v. London Tramways Co.*, 16 Ch. D. 344.

(*k*) *Masonic, &c., Ass. Co. v. Sharpe*, [1892], 1 Ch. 154. *Secus* as to interest on capital paid up in advance of calls. *Lock v. Queensland, &c., Mort-*

not, it is conceived, be authorised, even by the memorandum of association (*l*), except in the case of companies formed for the purpose of making or working railways in India (*m*). Bk. III. Chap. 3.
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Independently of any statute, if a company pledges its funds for the payment of debts, and the directors misapply those funds by knowingly paying dividends out of capital, they are liable to make good the monies so misapplied (*n*). Moreover, since the payment of dividends out of capital by a limited company is *ultra vires* (*o*), it is conceived that directors responsible for such payment are liable to replace the amount of dividends so paid, although they may have acted honestly (*p*); if they know the facts an honest belief that the payment is legal will not protect them (*q*). In practice, however, dividends are very seldom paid out of capital; they are paid notwithstanding the loss of capital (*r*). Directors who pay dividends although capital has been lost, are not liable if they do so without knowing it and without negligence (*rr*). Even if they do know it, they are apparently not liable if the company's income exceeds its expenditure and its articles allow such payment (*s*). Personal liability
of directors.

Dividends out
of capital.

Dividends after
loss of capital.

Apart, however, from any question of *ultra vires*, directors who pay dividends declared on accounts which are in fact false, Dividends
declared on
false accounts.

gage Co. [1896], A. C. 461; *Dale v. Martin*, 11 L. R. Ir. 371, and Table A., art. 73.

(*l*) See *Trevor v. Whitworth*, 12 App. Ca. 409; *National Bank of Wales, Ltd.* [1899], 2 Ch. 629.

(*m*) See Indian Railways Act, 1894, 57 & 58 Vict. c. 12. Such companies may, with the sanction of the Secretary of State for India, pay interest out of capital in their paid-up share capital during the construction of their railway, subject to the restrictions and conditions imposed by the Act, if authorised to do so by the memorandum of association or special resolution. The Act expires on the 31st Dec., 1905, see § 9.

(*n*) *National Bank of Wales, Ltd.* [1899], 2 Ch. 629; *Masonic &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154; *Leeds Estate Building Socy. v. Shepherd*, 36 Ch. D. 787; *Oxford Benefit*

Building Socy., 35 Ch. D. 502; *Alexandra Palace Co.*, 21 Ch. D. 149; *Flitcroft's case*, ib. 519; *Evans v. Coventry*, 4 De G. M. & G. 835.

(*o*) See cases in last note and *Trevor v. Whitworth*, 12 App. Ca. 409.

(*p*) See *dicta* to the contrary, per Vaughan Williams, J., in *Kingston Cotton Mills Co.* (No. 2) [1896], 1 Ch. 331; the point was not alluded to by the Court of Appeal [1896], 2 Ch. 279.

(*q*) *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154.

(*r*) *National Bank of Wales, Ltd.* [1899], 2 Ch. 629, p. 669; *Verner and General Commercial, &c., Trust* [1894], 2 Ch. 239, p. 265.

(*rr*) *Dovey v. Cory* [1901], A. C. 477.

(*s*) See *ante*, pp. 600 and 601. That the company is not a debtor to capital, see *ante*, p. 544.

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Sect. 8.

or which do not fairly represent the financial position of the company in accordance with the requirements of its regulations, when the true state of the company's business or its regulations do not justify their payment, will be liable to make good to the company the dividends so paid away, if they know the accounts are false or improper, or if they have passed them without exercising the degree of care (*ss*) which they are bound to exercise in the management of the company's business (*t*). But a director who honestly and reasonably believes the accounts to be fair and proper, and to justify the payment of the dividend, will not be liable to refund dividends declared and paid upon them, although they may in fact be false or even fraudulent (*u*). Moreover, in these cases, as in others, a director who is himself acting honestly is justified in trusting other officers of the company to perform their duties honestly if he has no reason to suspect they are not doing so (*x*), and does not place undue reliance on them or delegate his own duties to them (*y*).

Liability joint
and several.

All the directors responsible for an improper payment of dividend are jointly and severally liable for the whole amount improperly paid away as dividends with interest thereon (*z*). The liability is in the nature of a breach of trust, and is not terminated either by death (*a*) or bankruptcy (*b*). It is, however, barred, except as to dividends received by the director

(*ss*) As to the degree of care required, see *ante*, pp. 521 *et seq.*

(*t*) *Dovey v. Cory* [1901], A. C. 477; affirming *National Bank of Wales, Ltd.* [1899], 2 Ch. 629; *Leeds Estate Building Socy. v. Shepherd*, 36 Ch. D. 787; *Oxford Benefit Building Socy.*, 35 Ch. D. 502; *Rance's case*, 6 Ch. 104; *Bloxam v. Metropolitan Ry. Co.*, 35 Ch. D. 502. See, too, *London and General Bank* (No. 2) [1895], 2 Ch. 673, as to liability of auditors, and *infra*, p. 618.

(*u*) *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales, Ltd.* [1899], 2 Ch. 629; *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 Ch. 104. See, too, *Kingston Cotton Mills Co.* (No. 2), [1896], 1 Ch. 331, and [1896], 2 Ch. 279.

(*x*) *Dovey v. Cory* [1901], A. C. 477, affirming *National Bank of Wales,*

Ld. [1899], 2 Ch. 629, noticed *ante*, p. 526; *Denham & Co.*, 25 Ch. D. 752.

(*y*) As in *Leeds Estate Building Socy. v. Shepherd*, 36 Ch. D. 787, *ante*, p. 527.

(*z*) *Masonic, &c. Ass. Co. v. Sharpe* [1892], 1 Ch. 154; *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Leeds Estate Building Soc. v. Shepherd*, 36 Ch. D. 787; *Flitcroft's case*, 21 Ch. D. 519; *Evans v. Coventry*, 8 De G. M. & G. 835. See the decree, clause 4. As to the extent of the liability when the dividends are paid out of borrowed money, see *Alexandra Palace Co.*, 21 Ch. D. 149.

(*a*) *Leeds Estate Building Socy. v. Shepherd*, 36 Ch. D. 787; *Masonic, &c., Ass. Co. v. Sharpe* [1892], 1 Ch. 154.

(*b*) See *Ramskill v. Edwards*, 31 Ch. D. 100.

himself, or in case of fraud on his part, by the Trustee Act, Bk. III. Chap. 3. 1888, after six years (c), and cannot be enforced after the com- --- Sect. 3. pany has been dissolved, unless the dissolution can be and is set aside for fraud (d). Shareholders who have accepted the dividend with full knowledge of the facts which make the Right to indemnity from shareholders. payment improper, are liable to indemnify the directors to the extent of the dividends they have themselves received (e).

The liability may be enforced in an action by the company Proceedings to enforce liability. before it is being wound up, or after the commencement of the winding up by proceedings for misfeasance under § 10 of the Companies Winding-up Act, 1890 (f). It seems that a creditor cannot proceed by action to enforce the liability (g). In the case of an incorporated company the fact that all the creditors have been paid affords no defence to proceedings by the liquidator (h).

Moreover, directors who for fraudulent purposes and in Criminal liability. order to induce shareholders and the public to believe that the affairs of a company are in a favourable position, declare dividends out of profits when there are no profits wherewith to pay them, or pay fictitious dividends, are guilty of a criminal offence, punishable both at common law (i) and by statute (k), and are liable to an action for damages at the instance of persons induced to take shares on the faith of such a misrepresentation made for that object (l).

A resolution by the directors or shareholders of a company, Exclusion of shareholder from share of profits. to exclude a shareholder from his share of the profits, can only be justified where the right to make such a resolution has been

(c) 51 & 52 Vict. c. 59, § 8, *National Bank of Wales, Ltd.* [1899], 2 Ch. p. 663; there was no appeal on this point, see [1901], A. C. p. 489. *Lands Allotment Co.* [1894], 1 Ch. 616. As to laches and delay apart from the statutes, see *Masonic, &c. Ass. Co. v. Sharpe* [1892], 1 Ch. 154.

(d) *Coxon v. Grant* [1891], 2 Ch. 73. As to the jurisdiction of the Court over dissolved companies, see *infra*, Bk. IV. c. 1, § 16, and c. 2.

(e) *Maxham v. Grant* [1899], 1 Q. B. 480, and *ante*, p. 542.

(f) See *infra*, Bk. IV., c. 1, § 7.

(g) See *Coxon v. Grant* [1891],

2 Ch. 73, and *Mills v. Northern Railway of Buenos Ayres*, 5 Ch. 621.

(h) *National Bank of Wales, Ltd.* [1899], 2 Ch. 629, affirmed *sub. nom.* *Dovey v. Cory* [1901], A. C. 477, distinguishing *Turquand v. Marshall*, 4 Ch. 376, a case of an unincorporated company.

(i) See *per* Lord Campbell, in *Burnes v. Pennell*, 2 H. L. C. 497; *R. v. Esdaile*, 1 Fos. & Fin. 213.

(k) See *infra*, p. 625 *et seq.*, on fraudulent accounts.

(l) *Bale v. Cleland*, 4 Fos. & Fin. 117, and other cases, *ante*, p. 110.

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Sect. 3.

Adley v.
Whitstable
Company.

Dividends payable rateably according to the number of shares.

clearly conferred by the Act, charter, or deed of settlement by which it is governed. A resolution to exclude a shareholder from his share of profits is very like a resolution to forfeit his share, and is illegal unless specially authorised (m).

In *Adley v. The Whitstable Company* (n), an incorporated company of oyster fishers and dredgers made a bye-law to the effect, that if any member should sell oysters, except those taken from the company's grounds, he should forfeit 10*l.*, and be excluded from all share in the profits which the company might make after the penalty was incurred and before it was paid. A member infringed the bye-law and refused to pay the penalty, and was thereupon excluded from all share of the profits of the company. But on a bill filed by him against the company, it was held that the bye-law was invalid (o); that the company had no right to exclude any of its members from their share of profits on any such ground as that in question; and that it was no defence that the profits of which the plaintiff sought a share were actually gone, having been divided amongst the other members. An objection that the parties, if any, accountable to the plaintiff, were the officers of the company, who paid those profits, and not the company itself, was also overruled, and a decree was made in the plaintiff's favour.

Where all shares are on the same footing, the shareholders will *prima facie* be entitled to have dividends declared and paid to them in proportion to the number of shares they respectively hold, although the amounts paid up in respect of them may be unequal (p). The same rule holds even where there are two issues of shares, if, by the regulations of the company, dividends are to be paid to all shareholders in proportion to their shares (q). But the application of this or any other general rule, may be excluded as regards any particular company by its Act, charter or regulations.

(m) See *infra*, c. 6; and *Griffith v. Paget*, 5 Ch. D. 894.

(n) 17 Ves. 315; 19 ib. 304; and 1 Mer. 107.

(o) An action was directed to be brought to try this question.

(p) *Oakbank Oil Co. v. Crum*, 8

App. Ca. 65. Of course, unpaid calls can be set off against dividends. See, also, 8 & 9 Vict. c. 16, § 120; 25 & 26 Vict. c. 89, Table A., art. 72.

(q) *Ibid.*; and see *Birch v. Cropper*, 14 App. Ca. 525.

In *Maughan v. Leamington Gas Company* (r), certain shareholders in a gas company were entitled to dividends up to 10 per cent., and certain other shareholders were only entitled to dividends up to 7 per cent. The surplus profits, if any, were to be applied first, in making up the dividends of past years to these amounts, and secondly, in reducing the charges for gas. The profits not being sufficient to pay a dividend of 10 per cent. on the one set of shares, and also a dividend of 7 per cent. on the other set, it was resolved to pay a dividend of 8 per cent. on the first, and 7 per cent. on the second. It was contended that this resolution was illegal, and that the dividend ought to be declared in the proportion of 10 to 7; and a suit was instituted to enforce this view. But the Court declined to interfere; considering that, according to the true construction of the statutes relating to the company, the above proportions might be departed from when the profits were insufficient to pay both classes of shareholders their maximum amounts of dividend.

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Sect. 3.

Maughan v.
Leamington
Gas Company.

It is by no means unusual for companies who have expended their original capital, to raise (under some power specially conferred upon them for the purpose) further capital by the issue of "preference shares," i.e., of shares the holders of which are to be entitled to share profits, up to a given amount, in preference to the other shareholders. The right to do this has been already examined (s).

Preference
shares.

Where preference shares have been issued by competent authority, the terms upon which they have been issued must, of course, be adhered to, except so far as they can be and are varied by an alteration of the company's regulations (t); and it has been decided in several cases, that unless there is some agreement or enactment to the contrary (u), preference shareholders are entitled to be paid out of the profits of the company their dividends to the amount guaranteed, before the other shareholders receive anything: so that if the profits divisible

Cumulative
preference.

(r) 15 W. R. 333.

(s) *Ante*, 549.

(t) See *ante*, p. 462, and on a reduction of capital, *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287, and *ante*, p. 557.

(u) The rule is rather one of

construction than law, and can be excluded by the terms upon which the preference shares have been issued. See *Staples v. Eastman Photographic Materials* [1896], 2 Ch. 303, distinguishing the cases referred to in the next note.

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Rights of
preference
shareholders.

Guaranteed
dividends.

at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits; the ordinary shareholders taking no profits until all arrears of guaranteed dividends have been paid to the preference shareholders (x). This rule, however, has been altered by statute, so far as concerns companies governed by the Companies' Clauses Consolidation Act (y).

So long as there are no profits, the preference shareholders get nothing, for they are not creditors of the company; but as soon as there are any profits to divide (z), they must be applied in payment of whatever is required to make up to the preference shareholders the sums guaranteed to them, including all arrears, if that is the bargain with them (a). They are not necessarily entitled on a winding up to any preference in respect of capital, but if they are entitled to a cumulative preferential dividend they may be entitled to have any funds representing undrawn profits, which have not been capitalised, applied in the payment of arrears due to them in respect of such dividends, before the ordinary shareholders receive any part of those funds (b).

Where the payment of a dividend of a certain amount is guaranteed, it becomes a question whether the monies payable under the guarantee form part of the general assets of the company, so as to be liable to the company's debts, or whether they belong to the shareholders individually. This question depends in each case upon the true construction of the contract and the *bonâ fides* of the transaction (c).

(x) See *Webb v. Earle*, 20 Eq. 556, and other cases cited *ante*, p. 554, note (o).

(y) 26 & 27 Vict. c. 118, § 14, noticed *ante*, p. 554.

(z) See as to the right to set aside reserve funds before dividing profits, *Fisher v. Black and White Publishing Co.* [1901], 1 Ch. 174, and *Burland v. Earle*, Times 11 Nov., 1901.

(a) See notes (u) and (x), and *Dent v. London Tramways Co.*, 16 Ch. D. 344; as to incidence of a Colonial income tax, see *Spiller v. Turner*

[1897], 1 Ch. 911, *infra*, p. 614.

(b) See *Bishop v. Smyrna Cassaba Rail. Co.* [1895], 2 Ch. 265, and *Bridgewater Navigation Co.* [1891], 2 Ch. 317; and compare *Crichton's Oil Co.* [1901], 2 Ch. 184, and *Odessa Waterworks Co.*, *ib.* 190, note, and *infra*, Bk. IV. c. 1, § 16.

(c) Compare *Re Stuart's Trusts*, 4 Ch. D. 213; *Bouch v. Sevenoaks Rail. Co.*, 4 Ex. D. 133, where the creditors established their claim, and *Ex parte Jegon*, 12 Ch. D. 503; *Waterford, Dungarvan and Lidmore Rail. Co.*, 5 L. R., Ir. 103 & 584, where

Dividends must not be declared or paid, unless they have been sanctioned in accordance with the company's regulations (*d*). The regulations also govern the mode of payment; *primâ facie* they must be paid in money, not in shares (*e*) or bonds (*f*), unless the company's regulations permit it, or all the shareholders so agree.

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Manner of
paying
dividends.

Bonuses or extra dividends may be declared out of accumulated profits or unexpected gains; but questions as to these seldom arise, except where shares are bequeathed or are held for life only, and they will be found considered in another part of the work (*g*).

Bonuses.

Shares standing in the name of a married woman being now *primâ facie* her separate property, dividends payable in respect of them are *primâ facie* payable to her (*h*).

Married women.

The law relating to the payment of dividends where charging orders have been made, where shares have been transferred, where transfers have been forged, and where a shareholder has died or become bankrupt, will be found in those parts of the work which treat of those subjects respectively.

Effect of
charging order,
etc.

Dividends which are actually declared and payable by an incorporated company, are recoverable by action brought by the person having the legal title to receive them, against the company. The declaration of a dividend does not make the company a trustee of the dividend for the person entitled to receive it, and the Statute of Limitations begins to run in favour of the company from the time when the dividend is payable (*i*). The plaintiff must prove that the dividend sought to be recovered has been declared, and has become payable,

Actions for
dividends.

the shareholders were held entitled. As to the power of the company to release such a guarantee, see *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

(*d*) *Nicholson v. Rhodesia Trading Co.* [1897], 1 Ch. 434.

(*e*) See *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

(*f*) *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 636. See, too, *Oakbank Oil Co. v. Crum*, 8 App. Ca. 65.

(*g*) See book iii. c. 7, § 3.

(*h*) See *ante*, pp. 57 *et seq.*; 45 & 46

L.C.

Vict. c. 75, §§ 6-8. Formerly an action for them had to be brought by her and her husband; see *Dalton v. Midland Rail. Co.*, 13 C. B. 474, where a married woman sued alone for dividends and recovered, the non-joinder of her husband not having been pleaded in abatement.

(*i*) *Severn and Wye, &c., Rail. Co.* [1896], 1 Ch. 559; *Smith v. Cork and Bandon Ry. Co.*, 1 R. 5 Eq. 65. In the case of unincorporated companies, see *Penny v. Pickwick*, 16 Beav. 246.

Bk. III. Chap. 3. and that he has the legal title to the dividend payable in
 Sect. 3. — respect of the shares by virtue of which he claims it. The
 circumstance that he is not a registered shareholder will not
 defeat his claim if he has been wrongfully removed by the
 company from the register (*k*). A married woman may sue
 for dividends on shares standing in her own name (*l*).

The non-payment of calls is, in most companies, an answer
 to an action for dividends; and even where it is not so, calls
 and dividends may be set off against each other (*m*).

Dividends of
 unincorporated
 companies.

Except where an action would lie by one partner against
 another for money in the hands of the latter payable to the
 former, an action for a dividend due to a member of an unin-
 corporated company would not lie before the passing of the
 Judicature Acts (*n*).

Dividends of
 particular com-
 panies.

Having made these general observations on the payment
 of dividends, it is proposed to notice shortly the legislative
 enactments bearing upon the same subject.

7 Wm. 4 & 1
 Vict. c. 73.

No shareholder in a company governed by the Letters Patent
 Act, is entitled to any share of the profits of the company
 unless he is registered as a shareholder (*o*).

8 & 9 Vict.
 c. 16.

The Companies' Clauses Consolidation Act declares, that a
 company governed by it shall not be bound to see to the
 execution of any trust, and that the receipt of the person, or
 of any one of the persons in whose name a share may be
 registered, shall be a discharge to the company for all monies
 paid in respect of such share, notwithstanding any trusts to
 which it may be subject (*p*). Interest upon all mortgage and
 bond debts must be paid in preference to any dividends (*q*),
 which are to be declared only at general meetings of the share-
 holders (*r*). It is the business of the directors, previously to
 every meeting at which it is proposed to declare a dividend,
 to prepare a scheme showing the profits which have accrued
 since the last meeting at which a dividend was declared, and

(*k*) *Dalton v. Midland Rail. Co.*,
 12 C. B. 458, and 13 ib. 474.

(*l*) 45 & 46 Vict. c. 75, §§ 1, 6-9,
 and *ante*, pp. 57 *et seq.*

(*m*) *Ante*, p. 606, note (*p*), *infra*,
 p. 611.

(*n*) See *Lyon v. Haynes*, 5 Man. &
 Gr. 504. See Partn. 547 *et seq.*

(*o*) 7 Wm. 4 & 1 Vict. c. 73, § 20.

(*p*) 8 & 9 Vict. c. 16, § 20.

(*q*) *Ib.* § 48.

(*r*) *Ib.* § 91.

apportioning such profit, or so much of it as they may consider applicable to the purposes of dividend, among the shareholders (s). No dividend is to be paid out of capital (t). The directors are authorised to set apart out of the profits such sum as they may think proper to meet contingencies, or for repairs and improvements (u). No shareholder is entitled to be paid any dividends unless he is registered, and has paid all calls due from him to the company (x).

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Sect. 3.

The Companies Act, 1862, is silent upon the subject of dividends. By Table A., however, it is provided that the directors may, with the sanction of the members, declare a dividend to be paid to them in proportion to their shares (No. 72). But no dividend is payable except out of profits (No. 73); and before recommending any dividend, the directors may set aside out of the profits such a sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company (No. 74) (y). Moneys due from any member, for calls or otherwise, may be deducted from the dividends payable to him (No. 75). Dividends unclaimed for three years may be forfeited for the benefit of the company (No. 76). No dividend bears interest (No. 77). If several persons are registered as joint holders of any share, the receipt of any one of them for the dividends payable in respect of such share is to be effectual (No. 1).

Companies Act,
1862.
Table A.

The Companies Act, 1867, gives a company power, if authorised by its regulations as originally framed, or as altered by special resolution, to pay dividends in proportion to the amount paid up on each share, in cases where a larger amount is paid up on some shares than on others (z).

Companies Act,
1867.

The Companies Act, 1880, gives a company power, by special resolution, to return accumulated profits, which might be distributed as a dividend or a bonus to the shareholders in reduction of the paid up capital of the company, the unpaid

Companies Act,
1880.
Reduction of
paid-up capital.

(s) Ib. § 120.

(t) Ib. § 121.

(u) Ib. § 122.

(x) Ib. §§ 8 & 123.

(y) See as to the exercise of this

power as against preference shareholders, *Fisher v. Black and White Publishing Co.* [1901], 1 Ch. 174.

(z) 30 & 31 Vict. c. 131, § 24 (3).

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capital being thereby increased by a similar amount. Any shareholder may decline to receive the return of his money, and require the company to retain it, but his share in regard to the payment of dividends is to be deemed to be paid up to the same extent only as the shares on which the repayment has been accepted. The company are to invest the amount retained on proper securities and pay the interest to the shareholder, applying the capital from time to time in paying the future calls, which may be made to replace the capital so reduced on those shares (a).

Companies Act,
1900.
Guaranteed
companies.

The Companies Act, 1900, prohibits any person from participating otherwise than as a member in the divisible profits of any company registered after 31st December, 1900, as a company limited by guarantee and not having a capital divided into shares (b).

Income Tax (bb).
In case of com-
panies resident
here.

A trading company registered in this country and managed by a board of directors meeting in this country, is resident in this country for the purposes of the Income Tax Acts, and carries on business, at least partly in this country, although the whole of its profits may be derived from property, such as a railway (c), mines (d), mills (e), or waterworks (f), situate abroad, and although the company may also be registered in the country where its property is situate, and although its ordinary business may be conducted by a committee of the board resident there (g). A company which is resident here, and which carries on business wholly or partly in this country, is liable to pay income tax on the whole of its profits wherever

Carrying on
business here.

(a) 43 Vict. c. 19, §§ 3-5, and ante, p. 562.

(b) 63 & 64 Vict. c. 48, § 27 (3). Before that Act see *Malleon v. General Mineral Syndicate* [1894], 3 Ch. 538.

(bb) As to the duty imposed on bodies corporate and incorporate in respect of real and personal property vested in them, see 48 & 49 Vict. c. 51, § 11, and *Surrey County Cricket Club* [1901], 2 K. B. 400.

(c) *San Paulo Brazilian Rail. Co. v. Carter* [1896], A. C. 31.

(d) *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428.

(e) *Calcutta Jute Mills Co. v. Nicholson*, 1 Ex. D. 428.

(f) *Alexandria Water Co. v. Musgrave*, 11 Q. B. D. 174.

(g) *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428; *London Bank of Mexico v. Aphorpe* [1891], 2 Q. B. 378.

earned (*h*), even though some of those profits are never remitted to this country except by being brought into account in making up the general profit and loss account in this country (*i*).

If, however, the English company instead of carrying on a trade itself, holds shares—it may be the whole of the shares—in a foreign company which carries on a trade abroad, the dividends payable in respect of such shares will be profits arising “from a foreign possession,” and income tax will only be payable in respect of the dividends remitted to this country, and will not be payable in respect of the dividends paid to the shareholders of the English company abroad without having been remitted here (*k*).

If a company's business is to deal in investments, profits arising on the realisation of its investments are assessable to income tax (*l*). Income tax under Schedule D. is payable by a building society in respect of interest on loans to its members, though the interest is not paid annually and is included in periodical payments which consist partly of interest and partly of instalments of principal (*m*).

A company resident here may not deduct from its profits interest paid to bondholders abroad (*n*), or bonuses paid on the repayment of loans (*o*). Insurance companies may, however,

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Carrying on
business abroad.

Deductions
from profits.

(*h*) See cases in the last five notes. As to the period over which profits are to be calculated when an incorporated company has purchased an existing business, see *Ryhope Coal Co. v. Foyer*, 7 Q. B. D. 485.

(*i*) *Gresham Life Ass. Socy. v. Bishop* [1901], 1 Q. B. 153; *London Bank of Mexico v. Aphorpe* [1891], 2 Q. B. 378; and *Scottish Mortgage Co. of New Mexico v. Inland Rev. Commrs.*, 14 R. 98 and 24 Sc. L. R. 87, distinguishing *Forbes v. Scottish Provident Institution*, 23 R. 322 and 33 Sc. L. R. 228.

(*k*) *Bartholomay Brewing Co. v. Wyatt*, and *Nobel Dynamite Trust Co. v. Wyatt* [1893], 2 Q. B. 499. See, too, in the case of unincorporated companies trading abroad and remitting profits to partners here,

Colquhoun v. Brooks, 14 A. C. 493, and *Partnership*, p. 397, note (*c*).

(*l*) *Scottish Investment Trust Co. v. Surveyor of Taxes*, 21 R. 202, and *W. N.* 1896, p. 108. Compare *Assets Co. v. Inland Revenue*, 24 R. 578, and *W. N.* 1897, p. 144.

(*m*) *Leeds Permanent Bldy. Socy. v. Mallandaine* [1897], 2 Q. B. 402.

(*n*) *Alexandria Water Co. v. Musgrave*, 11 Q. B. D. 174.

(*o*) *Arizona Copper Co. v. Surveyor of Taxes*, 19 R. 150, and *W. N.* 1896, p. 93. And see further as to deductions, *Reid's Brewery Co. Ltd. v. Male* [1891], 2 Q. B. 1, where losses on loans by brewers to publicans were allowed; and compare *Watney v. Musgrave*, 5 Ex. D. 241, where money expended in the purchase of leases of tied houses, *Brickwood & Co. v.*

Bk. III. Chap. 3. deduct the annuities paid by them ; for the granting of such
Sect. 3. annuities is part of their business, and they must be deducted
before the profits of the business can be ascertained (p).

In case of
companies not
resident here.

Companies not resident in this country but exercising a trade here (q) are only assessable in respect of their profits earned here (r), and so much of their profits earned abroad as are remitted here for division amongst their shareholders (s). The investment of its funds by a mutual insurance company is not part of its trade (t).

Colonial Income
Tax Acta.

Revenue Acts of a colonial government do not affect the rights *inter se* of English shareholders in an English company.

Spiller v. Turner.

Thus, where an English registered company with a capital divided into preference shares, entitling the holders to a fixed cumulative preferential dividend, and ordinary shares, carried on business in a colony, the legislature of which passed an Act

Reynolds [1898], 1 Q. B. 95, where money expended in repairs to tied houses, *Southwell v. Savill Brothers Ltd.* [1901], 2 K. B. 349, where the costs of unsuccessful applications for licences and other expenses connected therewith, *Rhymney Iron Co. v. Fowler* [1896], 2 Q. B. 79, where subscriptions by a colliery company to a coal owners association, and *Royal Ins. Co. v. Watson* [1897], A. C. 1, where under special circumstances a salary to a late manager were not allowed, on the ground that the monies so expended were employed as capital. As to deductions for depreciation, see as to mode of estimation, *Leith, Hull, &c., Packet Co. v. Inland Revenue*, 1 Fraser, 1117, and W. N. 1900, p. 210, and *Cunard Steamship Co. v. Coulson* [1899], 1 Q. B. 865.

(p) *Gresham Life Ass. Socy. v. Styles* [1892], A. C. 309. As to deduction of premiums in the case of life insurance companies, see 16 & 17 Vict. c. 34, § 54, and *ib. c. 91, § 1*. The benefit of this enactment does not extend to foreign companies, *Colquhoun v. Heddon*, 25 Q. B. D. 129.

As to what are profits of insurance companies assessable to income tax, see *Last v. London Ass. Corp.*, 10 App. Ca. 438 ; *New York Life Ins. Co. v. Styles*, 14 App. Ca. 381 ; *Equitable Life Ass. Socy. of United States v. Bishop* [1900], 1 Q. B. 177 ; and as to funds appropriated by statute to certain purposes, *Mersey Docks Co. v. Lucas*, 8 App. Ca. 891.

(q) As to what is exercising a trade here, see *Erichsen v. Last*, 8 Q. B. D. 414 ; *Grainger v. Gough* [1896], A. C. 325 ; *Wingate & Co. v. Inland Revenue*, 24 R. 939, and W. N. 1898, p. 129 ; *Watson v. Sandie and Hull* [1898], 1 Q. B. 326.

(r) *Att.-Gen. v. Alexander*, L. R. 10 Ex. 20 ; *Werle & Co. v. Colquhoun*, 20 Q. B. D. 753.

(s) *Gilbertson v. Ferguson*, 7 Q. B. D. 562. See, too, *Colquhoun v. Brooks*, 14 A. C. 493.

(t) *Scottish Provident Institution v. Commrs. of Taxes* [1901], A. C. 340, a case under the Victorian Income Tax Act, 1895. See, too, as to trading, *England v. Wall* [1898], A. C. 758, also a decision under that Act relating to the same company.

imposing a duty in the nature of income tax on all dividends paid out of assets in the colony and making the duty payable in respect of the dividends received by a member a debt due by him to the Crown, it was held that preference shareholders not domiciled in the colony were entitled to receive their preference dividend in full without any deduction to meet the colonial tax (*u*).

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When debts are due to a company carrying on business in a colony by debtors outside the colony and payable outside the colony, but are charged upon real and personal property in the colony, the interest of the company in such property is an asset of the company in the colony, though its value is not necessarily the full value of the debts (*x*).

Locality of
assets.

A tax upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and when no such balance has been made then is no income capable of being assessed for taxation (*y*).

Income.

SECTION IV.—OF THE ACCOUNTS OF COMPANIES.

1. *Of the duty to keep, and the right to inspect them, and the audit thereof.*

The duty of keeping the accounts of companies necessarily devolves upon the managers and directors, or persons superintended by them. The right of the shareholders to inspect such accounts is also necessarily limited; for if every shareholder were at liberty to examine the accounts whenever he desired to do so, it would be impracticable for the accounts ever to be kept or made up in a proper manner. The right of shareholders to inspect accounts is usually qualified by express agreement; but it requires no express agreement to confer the right, for that is a consequence of their right to share profits; and where there is no agreement to the contrary, the writer apprehends that the shareholders of a company are entitled to have its accounts produced at their

Accounts of
companies.

Shareholders'
right to inspect
them.

(*u*) *Spiller v. Turner* [1897], 1 Queensland.
Ch. 911.

(*y*) *Lawless v. Sullivan*, 3 App.
(*x*) *Walsh v. The Queen* [1894], Cas. 373, a decision on an Act of
A. C. 144, a decision on an Act of New Brunswick.

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meetings and to appoint persons to inspect and examine them.

Moreover, a right to inspect includes a right to take a copy, if inspection is useless without a copy, and if there is no provision for the supply of copies; it also includes a right to inspect by an agent against whom the company has no reasonable grounds of objection (z).

If a company's regulations provide for the inspection of its accounts by the shareholders at certain times and subject to certain restrictions, then, it seems, the shareholders are not entitled to inspect the accounts, otherwise than subject to the restrictions mentioned (a). Nor does a right to inspect the books of a company necessarily extend to the minutes of the meetings of the directors (b). The right may, and often does, cease on the commencement of a winding up (c).

Mandamus to
permit inspection.

It has been decided that a shareholder who, by the terms of a company's special Act, is entitled at all reasonable times to inspect the books of the company, and who has applied for an inspection and has been refused, is not entitled to a mandamus against the company to allow inspection, unless, before inspection was refused him, he stated for what purpose he desired to see the books, and unless such purpose was, in the opinion of the Court, a reasonable purpose, and unless the refusal proceeded from the managing body (d).

Inspection in an
action.

When a person obtains from a court of justice an order to

(z) See *ante*, p. 434, and generally as to the right of a member of a corporation to inspect the corporation's books, &c., see *Rez v. The Fraternity of Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223, and notes to that case; *Holland v. Dickson*, 37 Ch. D. 669; *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. D. 92.

(a) See *Baldwin v. Lawrence*, 2 Sim. & Stu. 18, and *Balaghat Gold Mining Co.* [1901], 2 K. B. 665. In *Hall v. Connell*, 3 Y. & C. Ex. 707, the Court disregarded the restrictive clauses; but see *Morgan's case*, 28 Ch. D. 620; *Turney v. Bayley*, 4 De G. J. & S. 332; *Williams v. The Prince of Wales Life Co.*, 23 Beav. 338.

(b) *R. v. Mariquita Mining Co.*, 1 E. & E. 289.

(c) *Yorkshire Fibre Co.*, 9 Eq. 650; *Morgan's case*, 28 Ch. D. 620; *Kent Coalfields Syndicate* [1898], 1 Q. B. 754; and *Somerset v. Land Securities Co.*, W. N. 1897, p. 29.

(d) *R. v. The Wilts and Berks Canal Co.*, 3 A. & E. 477; *R. v. The Grand Canal Co.*, 1 Ir. Law Rep. 337. See, too, *R. v. Clear*, 4 B. & C. 899; *R. v. Governor of Bank of England* [1891], 1 Q. B. 785. In an action for calls the Court will not order the company to produce its books in order to enable the shareholders to fish out a defence, *Birm., Bristol, &c., Co. v. White*, 1 Q. B. 282.

inspect for some purpose connected with a pending litigation, he is bound to conduct himself in a peaceable, decorous, and gentlemanly manner, and not to make public, or communicate to strangers to the litigation the contents of the documents he may have had produced to him (e).

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The directors of a company have no power, by any resolution of their own, to exclude one or more of their number from access to the company's books. This has been decided in suits against directors who, in answers to interrogatories as to the contents of the books, have sworn ignorance of those contents, and inability to ascertain them, in consequence of orders given by the other directors to the officers having charge of the books not to allow them to be seen. This answer is insufficient, for the directors interrogated must, if necessary, enforce their right to examine the books, and time will be afforded them for that purpose (f).

Right of a
director to see
accounts, &c.

The first duty of auditors is to ascertain what duties are imposed upon them by the company's regulations, and by the Acts by which it is governed, and to conduct their audit accordingly. Speaking generally, it is their duty to examine the company's books and accounts, and to report whether the balance sheet exhibits a correct view of the company's financial position at the time of the audit; and in doing this they ought not to confine themselves to verifying the arithmetical accuracy of the figures in the balance sheet. It is, however, no part of their duty to consider whether the business is prudently or imprudently conducted; nor is it their duty to take stock. If special knowledge is required to value the stock, or for any other purpose connected with the audit, they are entitled to act on an expert's opinion. If the company's officers have, or may reasonably be supposed to have, such special knowledge, the auditors may trust to them if they have no reason to suspect their honesty. If, as is usually the

Duties of
auditors.

(e) *Williams v. Prince of Wales Life Ass. Co.*, 23 Beav. 338, and see the undertaking given in *Bevan v. Webb* [1901], 2 Ch. 59.

too, *Stuart v. Lord Bute*, 12 Sim. 460; *Turquand v. Marshall*, 6 Eq. 112, which, however, was reversed, 4 Ch. 376. As to answers to interrogatories, see *ante*, p. 379.

(f) See *Taylor v. Rundell*, 1 Y. & C. C. C. 128, and 1 Ph. 222. See,

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case, it is their duty to report to the shareholders, they will not discharge their duty by reporting to the directors. Moreover, except perhaps under very exceptional circumstances, their report ought to contain the information to which the shareholders are entitled; if it merely gives the shareholders the means of information, it will not be sufficient. Auditors are bound to exercise a reasonable amount of care and skill in the discharge of their duties. The amount of care and skill which is reasonable depends on the circumstances of each case; if there is nothing to excite their suspicion, less care will be reasonable than if their suspicions were, or ought to have been, aroused (*g*).

Liability of
auditors.

Auditors who honestly discharge their duties with the requisite amount of care and skill incur no liability even though they have committed errors of judgment and the balance sheet and accounts are in fact false and misleading (*h*). If they do not do so, they will be jointly and severally liable to make good any loss caused thereby, *e.g.*, if dividends are improperly declared and paid on false or misleading accounts certified by them as correct, they will be jointly and severally liable to make good all monies so misapplied, with interest (*i*).

Liability,
how enforced.

If the auditors are, as is usually the case, officers of the company (*k*), and the company is being wound up under the Companies Acts, their liability can be enforced by proceedings for misfeasance under § 10 of the Companies Winding-up Act, 1890 (*l*). If they are not officers of the company, or if the company is not being wound up, their liability can be enforced in an action by the company (*m*).

(*g*) *Kingston Cotton Mills Co.* (No. 2) [1896], 2 Ch. 279, reversing *ib.* [1896], 1 Ch. 331; *London and General Bank* (No. 2) [1895], 2 Ch. 673; *Leeds Estate Building, &c., Co. v. Shepherd*, 36 Ch. D. 789.

(*h*) *Kingston Cotton Mills Co.* (No. 2) [1896], 2 Ch. 279, reversing *ib.* [1896], 1 Ch. 331.

(*i*) *London and General Bank* (No. 2) [1895], 2 Ch. 673; *Leeds Estate Building, &c., Co. v. Shepherd*, 36 Ch. D. 789.

(*k*) See *London and General Bank* [1895], 2 Ch. 166, and *ib.* p. 673; *Kingston Cotton Mill Co.* [1896], 1 Ch. 6. Compare *Western Counties, &c., Milling Co.* [1897], 1 Ch. 617, where a person who acted as auditor without having been appointed to the office was held not to be an officer. See also *infra*, p. 621, note (*y*).

(*l*) See *infra*, Bk. IV. c. 1, § 7.

(*m*) *Leeds Estate Building Co. v. Shepherd*, 36 Ch. D. 789.

Some Acts of Parliament relating to companies contain express enactments upon the subject of accounts, and especially as to their audit and the right of the shareholders to examine them. These enactments, so far as they are contained in public general statutes now in force, are confined to companies governed by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, the Companies Acts, 1862, 1879, and 1900, the Life Assurance Companies Acts, 1870 and 1872, and the Stannaries Act, 1887.

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Statutory enactments relating to companies' accounts and the audit thereof.

As to companies governed by the Companies Clauses Consolidation Act.

The 8 & 9 Vict. c. 16, contains several provisions relating to the appointment and duties of auditors, and to the keeping and inspection of accounts, the general effect of which is as follows (n): Two auditors (or such other number, if any, as the company's special Act may require) are to be elected by the shareholders, and one auditor is to go out of office every year, but may be re-elected. The directors are to deliver to the auditors accounts and balance sheets before every ordinary meeting of shareholders, and the auditors are to examine the same, and either report upon them or simply confirm them, and the auditors' report or confirmation is to be read at the meeting (o). The auditors, or any one of them, may appoint an accountant to assist in the audit (p). The directors are required to have proper accounts kept of all monies received or expended on account of the company, and to appoint a book-keeper to keep the accounts. The books of the company are to be balanced at the periods prescribed in the company's special Act; and if no period is prescribed, fourteen days at least before each ordinary meeting. On the books being so balanced, a balance sheet is to be made up and signed by the chairman or deputy chairman of the directors, and such balance sheet is to exhibit a true statement of the capital, stock, credits, and property of every description belonging to the company, and the debts due by

Accounts of companies governed by 8 & 9 Vict. c. 16.

(n) §§ 101-108, and 116-119, and as to taking security from officers entrusted with money belonging to the company, and to the summary method of making them account, see §§ 109-114. See, also, 30 & 31

Vict. c. 127, § 30.

(o) The audit does not bind the shareholders, *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337.

(p) § 108. *Steele v. Sutton Gas Co.*, 12 Q. B. D. 68.

Bk. III. Chap. 3. the company, and a distinct view of the profits or loss which
 Sect. 4. may have arisen on the transactions of the company in the course of the preceding half-year. The books so balanced, and the balance sheet, are required to be open for the inspection of the shareholders at the principal office or place of business of the company for fourteen days before, and one month after every ordinary meeting, if no other periods are prescribed by the company's special Act, and during those periods the shareholders have a right to see the books, and to take copies and extracts therefrom; but they are not entitled to demand inspection of such books at any other time, unless in virtue of an order signed by three directors (g).

As regards companies governed by the Companies Acts.

Companies
 Act, 1862.

Inspection by
 Board of Trade;

The Companies Act, 1862, provides (r) that, upon the application of a certain number of the shareholders of any company registered under it, the Board of Trade may appoint inspectors to examine and report on the affairs of the company; and such inspectors are empowered to call for and examine all the company's documents and books, and to examine the officers and agents of the company upon oath. The expenses of the inspectors are to be defrayed by the shareholders upon whose application they were appointed.

or by inspectors
 specially ap-
 pointed by the
 company.

Instead of applying to the Board of Trade, the shareholders themselves may, by special resolution, appoint inspectors for the purpose of examining into the affairs of the company, with the same powers as are conferred upon inspectors appointed by the Board of Trade (s). A copy of the report of the inspectors, authenticated by the seal of the company, is admissible in evidence in any legal proceeding (t).

Statements to
 be made by
 banking, in-
 surance and
 other com-
 panies.

Every limited banking company, and every insurance company, and every deposit, provident, and benefit society governed by the Companies Act, 1862, is bound, before it begins business, and twice a year whilst it carries on business, to make a statement in a prescribed form, showing the state of its assets and liabilities; and a copy of such statement is to be

(g) See, also, as to loan capital accounts of railway companies, 29 & 30 Vict. c. 108.

(r) 25 & 26 Vict. c. 89, §§ 56-59.

(s) Ib. § 60.

(t) Ib. § 61.

Bk. III. Chap. 3. the company, and a distinct view of the profits or loss which
 Sect. 4.

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Sect. 4.

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As regards companies governed by the Companies Acts.

Companies Act, 1862.

Inspection by Board of Trade;

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or by inspectors specially appointed by the company.

Instead of applying to the Board of Trade, the shareholders themselves may, by special resolution, appoint inspectors for the purpose of examining into the affairs of the company, with the same powers as are conferred upon inspectors appointed by the Board of Trade (s). A copy of the report of the inspectors, authenticated by the seal of the company, is admissible in evidence in any legal proceeding (t).

Statements to be made by banking, insurance and other companies.

Every limited banking company, and every insurance company, and every deposit, provident, and benefit society governed by the Companies Act, 1862, is bound, before it begins business, and twice a year whilst it carries on business, to make a statement in a prescribed form, showing the state of its assets and liabilities; and a copy of such statement is to be

(q) See, also, as to loan capital accounts of railway companies, 29 & 30 Vict. c. 108.

(r) 25 & 26 Vict. c. 89, §§ 56-59.

(s) Ib. § 60.

(t) Ib. § 61.

kept in some conspicuous place in the registered office of the company, and in every branch office where its business is carried on, and every member and creditor of the company is entitled to a copy of such statement on payment of sixpence (*u*). Bk. III. Chap. 3.
Sect. 4.

Apart from these provisions the Companies Act, 1862, left each company to make what regulations it pleased respecting the keeping, inspection, and auditing of accounts, though, as will be seen hereafter, regulations dealing with these matters are contained in Table A. (*v*).

The Companies Act, 1900, however, contains some important enactments relating to the appointment of auditors and their duties. The Companies
Act, 1900.

Every company registered under the Companies Acts, either before or after the commencement of the Companies Act, 1900 (*x*), must appoint an auditor or auditors at each annual general meeting, to hold office until the next annual general meeting (*y*). Appointment of
auditors. If this is not done, the Board of Trade may, on the application of any member, appoint an auditor for the current year (*z*). The first auditors may be appointed by the directors before the statutory meeting (*a*). Auditors so appointed hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at such meeting may appoint auditors (*b*). The directors may fill any casual vacancy in the office of auditor, but the surviving or continuing auditor or auditors may act during a vacancy (*c*). The remuneration of auditors appointed before the statutory meeting or to fill any casual vacancy may be fixed by the directors (*d*); the remuneration of an auditor appointed by the Board of Trade is fixed by the Board of Trade (*e*); in other

(*u*) *Ib.* § 44, and Sched. I. *Kingston Cotton Mills Co.* [1896], Form D. See further, *infra*, p. 622. 1 Ch. 6.

(*v*) See *infra*, p. 623.

(*x*) 63 & 64 Vict. c. 48, §§ 30 and 31, but see *infra*, notes (*a*) and (*h*).

(*y*) *Ib.* § 21 (1). *Semble*, these auditors are officers of the company; see *London and General Bank* [1895], 2 Ch. 166, and *ib.* p. 673, a decision on similar provisions in the Companies Act, 1879, noticed *infra*, and

(*z*) *Ib.* § 21 (2).

(*a*) As to this meeting, see § 12, and *ante*, pp. 467 and 473. Section 12 only applies to companies limited by shares. See note (*h*), *infra*.

(*b*) § 21 (4).

(*c*) § 21 (5).

(*d*) § 22.

(*e*) § 21 (2). The remuneration is payable by the company.

Bk. III. Chap. 3. cases their remuneration must be fixed by the company in
 Sect. 4. general meeting (f). No director or officer of the company
 can be appointed an auditor (g).

Rights and
 duties of
 auditors.

Every auditor has a right of access at all times to the books and accounts and vouchers of the company, and is entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of his duties. The auditors must sign a certificate at the foot of the balance sheet stating whether or not their requirements have been complied with. They must make a report to the shareholders (h) on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office (i). They must state in each of their reports whether in their opinion the balance sheet referred to is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and their report must be read before the company in general meeting (k).

Accounts of
 banking com-
 panies governed
 by the Com-
 panies Act,
 1879.

The Companies Act, 1879, which applies to every banking company registered as limited after the passing of that Act, contains provisions (l) very similar to those now contained in the Act of 1900. The main differences are as follows: Under the Act of 1879 the auditors must be appointed annually by general meeting, and their remuneration fixed by the meeting appointing them (m). If there is no surviving auditor, the directors must at once call an extraordinary general meeting to fill up the vacancies (n). The auditors are entitled

(f) § 22.

(g) § 21 (3).

(h) This reference to shareholders may possibly limit these sections to companies having a share capital. See also the reference to a statutory meeting in § 21 (4), and *ante*, p. 42.

(i) The Companies Acts do not contain any provision requiring the balance sheet to be laid before a general meeting. This, however, is required by Table A (No. 81), and is usually provided for by the articles of association.

(k) § 23. See generally, on the duties of auditors under this Act, the

joint opinion of Mr. Justice Swinfen Eady and Messrs. Haldane, K.C., Kirby, and Palmer, 45 Sol. J., p. 167.

(l) 42 & 43 Vict. c. 76, §§ 7 and 8.

(m) § 7 (1) and (7). *Qu.*, therefore, whether the directors can appoint the first auditors and fix their remuneration under the Act, 1900, §§ 21 (4) and 22.

(n) 42 & 43 Vict. c. 76, § 7 (4). Compare Act, 1900, § 21 (5). As to the right of the shareholders to require and, if necessary, to call an extraordinary general meeting, see *ib.* § 13, and *ante*, p. 474.

to a list of all the books kept by the company (*o*). If the company has branch banks outside Europe, it is sufficient if the auditors are allowed access to such copies of and extracts from the books and accounts of any such branch as may have been transmitted to the head office in the United Kingdom (*p*). Every balance sheet submitted to any meeting of the members must be signed not only by the auditors, but also by the secretary or manager (if any), and by the directors of the company, or three of such directors at least (*q*). It is apprehended that these provisions are still in force and apply to banking companies governed by the Act of 1879. On the other hand, the Act of 1879 does not contain any provision enabling the members of the company to apply to the Board of Trade to appoint an auditor and fix his remuneration if none are appointed at the general meeting (*r*); nor does it require the auditors to sign a certificate at the foot of the balance sheet stating whether or not their requirements have been complied with (*s*). It is, however, apprehended that the provisions of the Act of 1900 dealing with these matters apply to banking companies governed by the Act of 1879.

By the regulations in Table A., appended to the Companies Act, 1862 (*t*), the directors are to cause true accounts to be kept of the stock in trade, receipts, expenditure, credits, and liabilities of the company. These books are to be kept at the registered office of the company, and are to be open to the inspection of the shareholders during the hours of business, subject to any reasonable restrictions, as to the time and manner of inspection, that may be imposed by the company in general meeting (*u*). The directors are required to lay

(*o*) 42 & 43 Vict. c. 76, § 7 (5).

(*p*) *Ib.* § 7 (5).

(*q*) *Ib.* § 8.

(*r*) See Companies Act, 1900, § 21 (2).

(*s*) *Ib.* § 23 (1).

(*t*) By 25 & 26 Vict. c. 89, § 15, the regulations in Table A. apply to all companies limited by shares, and formed under that Act, with the exception of such of those com-

panies as have other regulations inconsistent with them. As to other companies registered under the Act see Sched. II., Form B., Nos. 29-34; and Forms C. and D., which incorporate Table A. These forms however are only model forms, and do not apply unless adopted, see §§ 14 and 15.

(*u*) 25 & 26 Vict. c. 89, Table A., No. 78.

Bk. III. Chap. 3. before the shareholders, once a year at least, a statement of
Sect. 4. the income and expenditure of the company (*x*), and also a balance sheet containing a summary of the property and liabilities of the company, and a printed copy of such balance sheet is to be sent to every shareholder (*y*).

Auditors. Table A. also contains provisions relating to the appointment and remuneration and the rights and duties of auditors (*z*). As the more important of these provisions are now contained in the Companies Act, 1900, it is not necessary to refer to them at length. It is sufficient to observe that so far as they are incorporated in the Act they can no longer be altered by special resolution or be excluded by special articles; that so far as they are inconsistent with the Act (*a*) they are overruled by it; and that so far as they are neither incorporated in the Act nor inconsistent with it (*b*) they have the same force and effect as before the Act was passed.

As regards companies governed by the Life Assurance Companies Act, 1870.

Life assurance companies.

By 33 & 34 Vict. c. 61 (*c*), all life assurance companies, other than those registered under the Acts relating to friendly societies, are required to keep the accounts relating to their life assurance business separate from the accounts relating to any other business, to make out annually statements of their revenue accounts and balance sheets, to have their financial position investigated periodically by an actuary who is to report thereon, to prepare statements of their life assurance and annuity business in the prescribed form up to the date of such investigation, and to lay all such statements and reports,

(*x*) Ib. Nos. 79 and 80.

(*y*) Ib. Nos. 81 and 82.

(*z*) Nos. 83-94.

(*a*) *Semble*, No. 90, as to filling casual vacancies, is inconsistent with § 21 (5). No. 91, limiting the right to apply to the Board of Trade to appoint an auditor to not less than five members, is inconsistent with § 21 (2).

(*b*) See No. 83, as to the necessity of an annual audit; No. 84, as to persons besides directors and officers who are ineligible for appointment

as auditors; No. 92, as to the right of auditors to be supplied with a balance sheet, and (No. 93) with a list of the company's books; No. 93, as to the employment of accountants; and No. 94, as to the duty of an auditor to state that the balance sheet contains the particulars required by Table A., and as to the reading of the directors' report.

(*c*) Amended by 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41. See *ante*, pp. 178 *et seq.*

duly signed in accordance with the provisions of the Act, Bk III. Chap. 3. Sect. 4. before the Board of Trade, and to furnish printed copies to their shareholders and policy-holders.

As regards companies governed by the Stannaries Act, 1887.

The purser of every cost-book mine to which the Stannaries Cost-book mining companies. Act, 1887, applies (d) is bound once at least in every sixteen weeks to enter in the cost-book accounts showing the actual financial position of the company at the end either of the financial month last preceding the entry, or of the last preceding calendar month, and to convene an ordinary meeting of the shareholders, and to lay the accounts before the meeting, and to submit them to the full inspection of all shareholders present. For any neglect of these duties he is liable to a penalty. The accounts, after they have been laid before the meeting of shareholders, are to be printed, and a copy sent to every shareholder, and to the lessors of the mines (e).

2. Of false and fraudulent accounts.

Before quitting the subject of accounts it is necessary to Fraudulent accounts. draw attention to certain important statutory enactments relating to false and fraudulent accounts. The Act 24 & 25 Vict. c. 96, consolidating the statutes relating to larceny and other similar offences, declares amongst other things that—

§ 82. Whosoever, being a director, public officer, or manager of any 24 & 25 Vict. c. 96. body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned (f).

§ 83. Whosoever, being a director, manager, public officer, or member Directors, &c., destroying books, &c. of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable

(d) See *ante*, p. 446, note (o).

(e) 50 & 51 Vict. c. 43, §§ 23, 25, and 26, and compare §§ 9 and 10 of the Stannaries Act, 1869 (32 & 33 Vict. c. 19).

(f) *I.e.*, by § 75, penal servitude

L.C.

for not more than seven nor less than three (now five) years; or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

Bk. III. Chap. 3. security belonging to the body corporate or public company, or make or
 Sect. 4. concur in the making of any false entry, or omit or concur in omitting
 any material particular, in any book of account or other document, shall
 be guilty of a misdemeanor, and being convicted thereof shall be liable,
 at the discretion of the court, to any of the punishments which the court
 may award, as hereinbefore last mentioned.

Publishing
 fraudulent
 statements.

§ 84. Whosoever, being a director, manager, or public officer of any
 body corporate or public company shall make, circulate, or publish, or
 concur in making, circulating, or publishing, any written statement or
 account which he shall know to be false in any material particular, with
 intent to deceive or defraud any member, shareholder, or creditor of such
 body corporate or public company, or with intent to induce any person to
 become a shareholder or partner therein, or to intrust or advance any pro-
 perty to such body corporate or public company, or to enter into any security
 for the benefit thereof, shall be guilty of a misdemeanor, and being con-
 victed thereof shall be liable, at the discretion of the court, to any of the
 punishments which the court may award, as hereinbefore last mentioned.

Discovery in
 such cases.

§ 85. Nothing in any of the last ten preceding sections of this Act con-
 tained shall enable or entitle any person to refuse to make a full and
 complete discovery by answer to any bill in equity, or to answer any
 question or interrogatory in any civil proceeding in any court, or upon
 the hearing of any matter in bankruptcy or insolvency; and no person
 shall be liable to be convicted of any of the misdemeanors in any of the
 said sections mentioned by any evidence whatever in respect of any act
 done by him, if he shall, at any time previously to his being charged with
 such offence, have first disclosed such act on oath, in consequence of any
 compulsory process of any court of law or equity, in any action, suit, or
 proceeding which shall have been *bond fide* instituted by any party
 aggrieved (g).

Companies Act,
 1862.

The Companies Act, 1862, also declares, "that if any
 director, officer, or contributory of any company wound up
 under this Act, destroys, mutilates, alters, or falsifies any
 books, papers, writings or securities, or makes or is privy to
 the making of any false or fraudulent entry in any register
 book of account or other document belonging to the company,
 with intent to defraud or deceive any person, every person so
 offending shall be deemed to be guilty of a misdemeanor, and
 upon being convicted shall be liable to imprisonment for any
 term not exceeding two years, with or without hard labour (h).
 The same Act also contains provisions by which directors and
 others may be ordered to be criminally prosecuted for offences
 relating to a company being wound up (i).

(g) As amended by the Bank-
 ruptcy Act, 1890, 53 & 54 Vict. c. 71,
 §§ 27 and 29.

(h) 25 & 26 Vict. c. 89, § 166.
 (i) Ib. §§ 167, 8.

The Companies Act, 1900, enacts that: "If any person in any return, report, certificate, balance-sheet, or other document, required by or for the purposes of this Act, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable on conviction or indictment to imprisonment for a term not exceeding two years, with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid: Provided that the fine imposed on summary conviction shall not exceed one hundred pounds" (*k*).

Bk. III. Chap. 3.
Sect. 4.
Companies Act,
1900.

The Stannaries Act, 1887, enacts that if any false statement or entry be made, or any material particular be omitted in the accounts of the cost-book mine with the knowledge of the purser, the purser shall be liable in respect of every such false statement, entry or omission, to a penalty not exceeding 50*l.*, to be recovered in a summary way before any two or more justices of the peace, who have power to award any portion of the penalty not exceeding one half to the prosecutor, provided he is a shareholder in the company or a person having a legal right to inspect the accounts; and the manager of the mine is also liable to a similar penalty if any false statement or entry be made, or material particular be omitted to his knowledge (*l*).

Stannaries Act,
1887.

Independently of all statutory enactments, moreover, persons who conspire to defraud others by false representations as to the solvency of companies are indictable (*m*).

Indictment for
conspiracy.

It has already been seen that an action for damages will lie against directors and others who issue false reports, and thereby induce persons to take shares in a company (*n*); and that an action may be maintained to rescind contracts entered into with a company on the faith of such reports (*o*).

Action for mis-
representation.

The duties and liabilities of auditors have also been discussed (*p*).

Liability of
auditors.

(*k*) 63 & 64 Vict. c. 48, s. 28.

(*l*) 50 & 51 Vict. c. 43, § 24.

(*m*) *Ante*, pp. 109 and 605.

(*n*) See *ante*, p. 110.

(*o*) *Ante*, pp. 95 *et seq.*, and see *infra*, c. 9, § 4.

(*p*) See *ante*, pp. 617, 618.

CHAPTER IV.

OF SHARES IN COMPANIES; THEIR TRANSFER AND SALE.

Bk. III. Chap. 4.

Subject of present chapter.

In the present chapter it is proposed to examine the following subjects:—

- § 1. The nature of a share in a company.
- § 2. The amount of a share.
- § 3. The lien which the company has on its members' shares.
- § 4. Of charging orders on shares.
- § 5. The transfer of shares.
- § 6. The sales of shares and questions arising thereon.

SECTION I.—OF THE NATURE OF A SHARE AND OF THE DOCTRINE THAT SHARES ARE PERSONAL ESTATE.

Nature of a share in a company.

Speaking generally, a share in a company signifies a definite portion of its capital. A share in a company, like a share in a partnership, is a definite proportion of the joint estate, after it has been turned into money and applied as far as may be necessary in payment of the joint debts (*a*). But it denotes also the various rights and liabilities which are incidental to the ownership of a share under the company's constitution (*b*). These rights usually include a right to receive dividends, and a right to vote.

Preference shares.

What are called preferential or guaranteed shares, are nothing more than shares the owners of which are entitled to certain rights or privileges in addition to those enjoyed by other shareholders (*c*).

Investing in shares.

Shares in companies are unfortunately too often regarded by the public in the light of securities. To "invest money in

(*a*) See *Watson v. Spratley*, 10 Ex. 222; *Sparling v. Parker*, 9 Beav. 450; *Hunt v. Gunn*, 13 C. B. N. S. 226.

Brothers & Co., Ltd. [1901], 1 Ch. 279. and *Taylor, Phillips and Rickards cases* [1897], 1 Ch. pp. 305-6.

(*c*) See *ante*, pp. 549, 550, 607 and

(*b*) See *Borland's Trustee v. Steel* 608.

shares" is a common expression not a little calculated to perpetuate this error. But it ought never to be overlooked that a shareholder is a partner in and not a creditor of the company to which he belongs; that if the company becomes insolvent, he cannot recover any part of his money invested until the company's debts are paid in full; that whether he is personally liable for the payment of those debts, and whether the extent of his liability is unlimited or limited, depends upon the nature of the company.

Shares, in short, are property (*d*); they have been held not to pass under a bequest of bonds, moneys, and securities (*e*); and no lawyer need be told that trustees who invest trust moneys in shares do that which is extremely improper, unless such an investment is clearly authorised by the trust or by statute (*f*). Directors who invest the money of their company in shares of other companies are *prima facie* guilty of a breach of trust (*g*), though they may perhaps accept such shares by way of compromise for the payment of a debt (*h*).

A power to invest upon the security of the funds of any company incorporated by Act of Parliament, does not authorise an investment in preference railway shares (*i*). But a loan on the security of shares is a loan on security, even in the case of a company lending money to a member on no other security than the lien on his shares conferred by the company's regulations (*k*).

A power to invest in the stocks, shares, or securities of an incorporated company paying a dividend, authorises an

(*d*) *E.g.*, for purposes of succession duty, *A.-G. v. Montefiore*, 21 Q. B. D. 461.

(*e*) *Ogle v. Knipe*, 8 Eq. 434; *Collins v. Collins*, 12 Eq. 455; *Hudleston v. Gouldsbury*, 10 Beav. 547, and *infra*, c. 7, § 3.

(*f*) See 56 & 57 Vict. c. 53, § 1, 23 & 24 Vict. c. 38, § 10, and R. S. C., Ord. XXII., r. 17. As to investing in shares on which the company has a lien, see *New London Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.

(*g*) *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Joint Stock*

Discount Co. v. Brown, 3 Eq. 139, and *ante*, pp. 253, 254. In *Burland v. Earle*, Times, 11 Nov. 1901, some of the investments complained of were the purchase of shares in banking companies, but no special complaint was made in respect of this.

(*h*) *Lands Allotment Co.* [1894], 1 Ch. 616.

(*i*) *Harris v. Harris*, 29 Beav. 107.

(*k*) *National Bank of Wales* [1899], 2 Ch. p. 675, affirmed *sub nom. Dovey v. Cory* [1901], A. C. 477; *General Exchange Bank*, 6 Ch. p. 821; and *infra*, p. 637.

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Sect. 1.

Shares not
securities.

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Sect. 1.

investment in the stock or shares of an incorporated company paying a fixed rate of interest to its stock or shareholders. But such a power does not justify a purchase or even the retention of stock or shares in the name of one trustee only, even although the regulations of the company do not allow shares to be held in the names of more than one person (*l*).

Shares are stock within the meaning of the Trustee Act.

Although shares are not securities on which trustees can invest without an express power so to do, shares in incorporated companies, even though not fully paid up, are stock within the meaning of the Trustee Act, 1893, and orders for their transfer under that Act may accordingly be made (*m*).

Shares in companies usually personal estate.

Shares in companies are expressly declared by statute to be personal estate in the following cases:—

1. Shares in companies governed by the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16, § 7).

2. Shares in companies governed by the Companies Act, 1862 (25 & 26 Vict. c. 89, § 22).

Shares in other companies are also, as a rule, personal and not real estate (*n*). But it cannot be affirmed that shares in companies are universally personal estate, inasmuch as there are undoubtedly exceptional cases which render it necessary to examine the constitution of every company before the character of its shares can be determined. The point to ascertain is whether the shareholders have individually any interest in land as land, or whether their interest is represented by mere money (*o*).

(*l*) *Consterdine v. Consterdine*, 31 Beav. 330. See, also, *Butler v. Withers*, 1 J. & H. 332, where the Court ordered shares to be sold rather than leave them in the name of one trustee.

(*m*) See 56 & 57 Vict. c. 53, *New Zealand Trust and Loan Co.* [1893], 1 Ch. 403. For form of order, see *Ib.* and *Re C. M. G.* [1898], 2 Ch. 324; *Re Gregson* [1893], 3 Ch. 233; and under the old Act, *Re Angelo*, 5 De G. & Sm. 278. See, under the Lunacy Act, *ante*, p. 57.

(*n*) See Partn., pp. 352 *et seq.*

(*o*) See *Morris v. Glynn*, 27 Beav.

218, where shares in an unincorporated iron company, working iron got from its own estates, and having estates for other purposes than those of iron manufacture, were held to be within the Mortmain Act, although by the deed of settlement of the company the shares were declared to be personal estate. This case was, however, disapproved in *Entwistle v. Davis*, 4 Eq. 272. New River shares are real estate. See *Townsend v. Ash*, 3 Atk. 336. See, as to debentures and debenture stock, under the Companies Clauses Acts, 1845 and 1863, see *ante*, pp. 345 and

In conformity, however, with the general rule, it has been held that shares in a waterworks company will pass under an unattested will if made before the present Wills Act (*p*); that shares in dock, canal, mining, or railway companies are not interests in land within the meaning of the Mortmain Act; nor within the fourth section of the Statute of Frauds; and do not give a right to vote for members of Parliament (*q*). And after some conflict of opinion, it seems at last settled that this is so, although the shares are not expressly declared to be personalty in the Act, charter, or deed of settlement constituting the company. The cases establishing these propositions are here collected for reference:—

1. *Shares not interests in land within the old Mortmain Acts* (*r*). Mortmain Act.

Land companies, *Entwistle v. Davis*, 4 Eq. 272.*

Dock companies, *Hilton v. Giraud*, 1 De G. & Sm. 183; * *Sparling v. Parker*, 9 Beav. 450; * *Walker v. Milne*, 11 Beav. 507.*

Railway companies, *Ashton v. Lord Langdale*, 4 De G. & Sm. 402,* (shares and scrip); *Linley v. Taylor*, 1 Giff. 67, and 2 De G. F. & J. 84.

Canal companies, *Ashton v. Lord Langdale*, ubi. sup.; * *Edwards v. Hall*, 6 De G. M. & G. 74; *Walker v. Milne*, 11 Beav. 507; * *Langham's Trusts*, 10 Hare, 446 (*s*).

Gas companies, *Sparling v. Parker*, 9 Beav. 450.*

Waterwork companies, *Ashton v. Lord Langdale*, ubi sup.

* In all the cases thus marked, the shares were declared to be personal estate by the company's charter, act, or deed of settlement. In the other cases nothing was declared as to this point.

346; as to mortgages of rates, *Jervis v. Lawrence*, 22 Ch. D. 202; *Thornton v. Kempson*, Kay, 592; *Re Harris*, 15 Ch. D. 561; of borough funds, *Re Thompson*, 45 Ch. D. 161; as to corporation stock, *Re Pickard* [1894], 3 Ch. 704; as to bonds of Harbour Commissioners, *Martin v. Lacon*, 33 Ch. D. 332; *Re David*, 43 Ch. 27; as to mortgages of waterworks, *Re Parker* [1891], 1 Ch. 682. Stock of the Metropolitan Board of Works has been decided to be so, *Cluff v. Cluff*, 2 Ch. D. 222. See now 51 & 52 Vict. c. 42, §§ 4 and 10, amended by 54 & 55 Vict. c. 73, and 55 & 56

Vict. c. 11.

(*p*) *Bligh v. Brent*, 2 Y. & C. Ex. 268, and *Weekley v. Weekley*, ib. 281, note.

(*q*) *Watson v. Black*, 16 Q. B. D. 270; *Bulmer v. Norris*, 9 C. B. N. S. 19; *Aclanp v. Lewis*, ib. 32; *Tepper v. Nichols*, 18 ib. 121. See, also, *Bennett v. Blain*, 15 ib. 518, and *Freeman v. Gainsford*, 18 ib. 185.

(*r*) The present Acts are 51 & 52 Vict. c. 42, 54 & 55 Vict. c. 73, and 55 & 56 Vict. c. 11.

(*s*) *Tomlinson v. Tomlinson*, 9 Beav. 459, *contra*, cannot be relied upon.

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Banking companies, *Ashton v. Lord Langdale*, ubi sup. (t); *Myers v. Perigall*, 11 C. B. 90, and 2 De G. M. & G. 599.*
Cost-book Mining companies, *Hayter v. Tucker*, 4 K. & J. 243.
Foreign Mining companies, *Baker v. Sutton*, 1 Keen, 234.
Insurance companies, see *March v. A.-G.*, 5 Beav. 433, where the question arose on the bequest of a policy payable out of the funds of the company.

Statute of
Frauds, § 4.

2. *Shares (u) not interests in land within the meaning of the 4th section of the Statute of Frauds.*

Waterwork companies, *Bligh v. Brent*, 2 Y. & C. Ex. 268; *Weekley v. Weekley*, ib. 281, note.
Cost-book Mining companies, *Powell v. Jessopp*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845; *Watson v. Spratley*, 10 Ex. 222 (x).
Banking companies, *Humble v. Mitchell*, 11 A. & E. 205.
Railway companies, *Duncuft v. Albrecht*, 12 Sim. 189; *Bradley v. Holdsworth*, 3 M. & W. 422.*

Shares, how far
goods and chattels.

Although, however, shares in companies holding land are not interests in land, it does not therefore follow that they have all the attributes of goods and chattels. They are not goods, wares, or merchandise within the exception in the Stamp Acts, exempting agreements relating to the sale of goods, shares, and merchandise from stamp duty (y). Nor are they goods and chattels within the meaning of the Factors Acts (z); nor within the seventeenth section of the Statute of Frauds, which requires an agreement for the sale of goods and chattels for the price of 10*l.* and upwards, to be in writing (a);

* See note *, ante, p. 631.

(t) *Ware v. Cumberledge*, 20 Beav. 503, *contra*, was overruled in *Edwards v. Hall*, 6 De G. M. & G. 74.

(u) As to debentures giving a floating charge on land, see *Driver v. Broad* [1893], 1 Q. B. 744.

(x) *Vice v. Anson*, 7 B. & C. 409, in which it was held that a share in a mine was real estate, and could not be transferred except by deed, is scarcely consistent with the modern decisions. In *Boyce v. Green*, Batty, 608, cited in Sugd. V. & P. p. 101, ed. 13, a share in a mining company was held to be an interest in land within the meaning of the 4th section of the Statute of Frauds, the

share having been regarded as a share of the land as land, rather than as a share of a money capital. If this really had been so, the case would have been rightly decided (see *Watson v. Spratley*, 10 Ex. 222; *Hayter v. Tucker*, 4 K. & J. 243); but having regard to the terms of the company's Act, it is difficult to arrive at the conclusion that the shareholders had more than a money interest.

(y) *Knight v. Barber*, 16 M. & W. 66.

(z) *Freeman v. Appleyard*, 32 L. J. Ex. 175, and see 38 Ch. D. 408.

(a) See *Humble v. Mitchell*, 11 A. & E. 205, as to banking companies; *Tempest v. Kilner*, 3 C. B. 249, as

but they are goods within Order L. r. 2 of the Rules of the Supreme Court, and may be sold thereunder (*b*), and within Order LVII., and may therefore be the subject of interpleader proceedings (*c*); their price may be recovered in an action for "goods and chattels" sold and delivered (*d*); they were *bona notabilia* in the diocese where the chief office of the company was situate (*e*); and they have been decided to be property in respect of which bail may justify (*f*). Whether shares in a cost-book mine are goods and effects attachable in the Lord Mayor's court has been discussed, but not decided (*g*).

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In *Colonial Bank v. Whinney* (*h*) the question whether shares are choses in action was much discussed, and it was ultimately held by the House of Lords that shares in a company incorporated by a special Act are things in action within the meaning of the proviso to the reputed ownership clause in the Bankruptcy Act, 1883 (*i*).

Chose in action.
Colonial Bank v. Whinney.

Shares in companies governed by modern statutes differ, however, in some important respects from ordinary choses in action; the legal, as well as the equitable, interest in them is capable of transfer; and where the legal ownership in them, or even only the legal right to be registered, is acquired by a *bonâ fide* purchaser for value without notice of a prior equitable interest, the title of such purchaser cannot be impeached (*k*).

If a share in a company governed by the Companies Act, 1862, or the Companies' Clauses Consolidation Act, or by any statute containing a provision similar to § 30 of the Companies Act, 1862, is equitably assigned or mortgaged more than once,

to projected railway companies; N. 339, railway shares.

Watson v. Spratley, 10 Ex. 222, as to cost-book mining companies; (*f*) *Pierpoint v. Brewer*, 15 M. & W. 201, 10 Jur. 79.

Bowlby v. Bell, 3 C. B. 284, and (*g*) *Tredinnick v. Oliver*, 5 H. & N. 780.

Duncuft v. Albrecht, 12 Sim. 189, as to railway companies. See, too, (*h*) 11 App. Ca. 426, reversing *Colt v. Nettervill*, 2 P. W. 304; S. C. 30 Ch. D. 261, where all the earlier authorities will be found.

Pickering v. Appleby, Com. 354. (*i*) 46 & 47 Vict. c. 52, § 44. The effect is that shares do not now pass to trustees in bankruptcy under the reputed ownership clause. See *infra*, c. 8.

(*b*) *Evans v. Davies* [1893], 2 Ch. 217.

(*c*) *Robinson v. Jenkins*, 24 Q. B. D. 275.

(*d*) *Lawton v. Hickman*, 9 Q. B. 563, railway shares.

(*e*) See *A.-G. v. Higgins*, 2 H. & (*k*) See *infra*, pp. 658 *et seq.*, under transfers in blank, and the next note.

Bk. III. Chap. 4. the priority of the assignees or mortgagees will be determined
Sect. 2.

ceteris paribus, by the priority of the assignments or mortgages, and not by the priority of the notices thereof, given to the company (l).

Mortgages of
shares.

There is no statute of limitations applicable to foreclosure of a mortgage of personal property; hence a mortgagee of shares may enforce his rights against them even after the personal remedy for the debt has been barred (m). Moreover, a mortgagee of shares or stock has an implied power of sale which he may exercise after the lapse of a reasonable time after default in payment by the mortgagor (n). A deposit of a share certificate to secure a loan is not a pledge; it confers on the depositee a right to an order for transfer and foreclosure, even though the deposit is not accompanied by any memorandum or agreement (o).

An agreement, entered into between a mortgagor and mortgagee on a mortgage of shares, that the mortgagor will always thereafter endeavour to secure the employment of the mortgagee as broker for the sale of the company's goods, and that if the company's goods are sold otherwise than through the mortgagee, he will pay the mortgagee the commission he would have earned if the goods had been sold through him, is a valid agreement and not a clog upon the equity of redemption (oo).

Slander of title.

An action may, it is apprehended, be sustained by a shareholder whose title is slandered, and who can prove special damage (p).

SECTION II.—THE AMOUNT OF A SHARE.

Shares in companies, like shares in partnerships, must be taken to be equal, unless the contrary is proved. As a general

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| (l) <i>Société Générale de Paris v. Walker</i> , 14 Q. B. D. 424; 11 App. Ca. 20; overruling <i>Martin v. Sedgwick</i> , 9 Beav. 332 and the cases there cited, and <i>Cumming v. Prescott</i> , 2 Y. & C. Ex. 488. | <i>Wilson</i> , 1 P. Wms. 261 and <i>sub. nom. Wilson v. Tooker</i> , 5 Bro. P. C. 193. See, too, <i>re Morritt</i> , 18 Q. B. D. 222. |
| (m) <i>London & Midland Bank v. Mitchell</i> [1899], 2 Ch. 161. | (o) <i>Harrold v. Plenty</i> [1901], 2 Ch. 314. |
| (n) <i>Deverges v. Sandeman Clark & Co.</i> [1901], 1 Ch. 70; <i>Tucker v.</i> | (oo) <i>Carritt v. Bradley</i> [1901], 2 K. B. 550. |
| | (p) See <i>Malachy v. Soper</i> , 3 Bing. N. C. 371. |

rule, shares in a company are equal. But it sometimes happens that a capital of a certain amount divided into a certain number of equal shares, is raised ; and that then a further capital is raised by the issue of a certain number of new shares, equal to each other, but not equal to the old shares. Moreover, it sometimes also happens, that whilst the old shareholders have paid up their shares in full, the new shareholders have paid in respect of theirs, less than the amount per share paid up by the old shareholders. In such a case there is not only inequality of shares, but inequality of money paid in respect of them ; and questions then arise as to the relative rights of the holders of the different kinds of shares, and especially with respect to the payment of dividends, and in case of dissolution, the apportionment of surplus assets. These questions are investigated elsewhere in connection with those subjects (*q*). Their solution depends on the true construction of the company's Act, charter, or deed of settlement ; but where they are silent on the point, the rights of the shareholders to surplus assets will be proportionate to the nominal value of their shares, and not to the amount paid up in respect of them (*r*). The same rule applies to dividends (*s*).

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Shares in companies sometimes unequal.

SECTION III.—OF THE LIEN WHICH A COMPANY HAS ON THE SHARES OF THEIR MEMBERS.

Each member of an ordinary partnership has a lien on the shares of his co-partners for what is due from them as partners to the firm (*t*) ; and by analogy to this rule every company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares. The writer is not aware of any case expressly establishing such a lien in favour of companies generally ; but he conceives that its existence cannot be successfully disputed, except where it is inconsistent with an express right of transfer ; and he has not met with any decision or dictum opposed to this view.

Lien of company
on share of
member.

(*q*) As to dividends see *ante*, p. 606. As to distribution of surplus assets, see *infra*, b. iv., c. 1, § 16.

Co., 39 Ch. D. 1.

(*r*) See *Birch v. Cropper*, 14 App. Ca. 525, reversing *Bridgewater Nav.*

(*s*) See *Oakbank Oil Co. v. Crum*, 8 App. Ca. 65.

(*t*) See Partn. 358 *et seq.*

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Lien of one
shareholder
as against
another.

It must, however, be observed that the lien which each partner has on the assets of the partnership, and on the shares of his co-partners, cannot be held to reside in every member of an incorporated company, without considerable modification ; for its existence is to a great extent inconsistent with the principle that a company is distinct from the individuals composing it, and would destroy many of the advantages resulting from that principle. Upon these grounds

Rheam v. Smith.

Lord Cottenham, in *Rheam v. Smith* (u), declined to restrain a creditor of a company from proceeding at law against one of its members ; although the creditor was himself a member of the company, and it was insisted that each member had a right to have the accounts of the company taken, and to have its assets applied in payment of its debts.

Lien of company
for debts due
to it.

Pinkett v.
Wright.

Again, the ordinary partnership lien is inconsistent with an unrestricted right of transfer. Hence it was held, in *Pinkett v. Wright* (v), that an Irish banking company had no lien on the shares of one of its shareholders for advances made to him by the bank. The Court was of opinion that with respect to the advances, the shareholder was in the position of an ordinary customer to whom the bank had advanced money, and that what was due from him as a customer did not give any right of lien upon his shares. The question arose between the bank and a transferee of the shares of the customer ; and to have allowed the lien would have gone far to destroy the transferability of the shares. The inconsistency of the lien contended for with the general objects of the company is well put by the Vice-Chancellor Wigram in the case in question.

Dunlop v.
Dunlop.

Again, in *Dunlop v. Dunlop* (x), a banking company had, by its deed of settlement, power to forfeit shares if the holder did not on demand pay all moneys due from him to the company ; and shareholders indebted to the company could not transfer their

(u) 2 Ph. 726. See, too, *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(v) 2 Ha. 120, and 12 Cl. & Fin. 764, *sub nomine Murray v. Pinkett*. See also *Dunlop v. Dunlop*, 21 Ch. D. 583, *infra*. Compare *Hague v. Dandeson*, 2 Ex. 741 ; *Ex parte Plant*, 4 Deac. & Ch. 160, where there was

an agreement for lien.

(x) 21 Ch. D. 583. The question arose between the devisee of land mortgaged to the company and a legatee of the shares. The latter was held not bound to contribute with the former to the payment of the mortgage debt.

shares. But it was held that these provisions gave the company no lien in the sense of an equitable charge on the shares of a person indebted to it enforceable by an action for their sale. Bk. III. Chap. 4.
Sect. 8.

It need scarcely be observed, that if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all moneys which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed. Moreover, in the case of companies governed by the Companies Acts, the articles may be altered so as to give the company a lien on the shares of members indebted to it even though the shares are fully paid up, and a lien so given may be enforced in respect of debts to the company in existence before the alteration of the articles (y). Agreements
for lien.

Alteration of
articles to
give lien.

The lien so created is not a mere passive right of retainer, but is an equitable charge actively enforceable, and when such a lien exists, a loan by the company to a member is a loan on security (z). If the member becomes bankrupt the company is a secured creditor, and can only prove on that footing (a). In the case of companies which are exempted from the duty of taking notice of trusts, the lien is available against a shareholder who is merely a trustee for others for debts due from him personally; and it is conceived that this is so even if the purchase of the shares was a breach of trust (b). On the other hand, the company has no lien on shares held by a trustee for the debts of the *cestui que trust*, and has no right to transfer the shares from the trustee to the *cestui que trust* in order to assert such a lien (c). So far as the lien gives a right to prevent a transfer, it is available against all persons claiming under a member indebted to the company (d). Nature of lien.

(y) *Allen v. Gold Reefs of West Africa, Ltd.* [1900], 1 Ch. 656. *infra*, p. 682, note (x).

(z) *Re General Exchange Bank*, 6 Ch. 818; *National Bank of Wales* [1899], p. 675, affirmed *sub nom. Dovey v. Cory* [1901], A. C. 477. (a) *Re Collie*, 3 Ch. D. 481; *Re Perkins*, 24 Q. B. D. 613.

(b) *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.

(c) *Ystalyfera Gas Co.*, W. N. 1887, p. 30; *Re Perkins*, 24 Q. B. D. 613. In the case of partners, see *Re Collie*, 3 Ch. D. 481.

(d) *Ex parte Plant*, 4 D. & C. 163.

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Waiver of lien.

The lien may be waived, but whether it has been waived or not in any particular case depends upon the circumstances of the case; the mere fact that the member has given the company special power to realise some of his shares upon his making default in payment is not sufficient to warrant the inference that the company has agreed to waive its lien on the other shares (e). Whether the lien prevents a transfer if the member has given the company a bill for the amount due, and such bill is still running, depends upon the true construction of the enactment or agreement. The currency of the bill will usually be found to suspend the lien (f); but a case may arise where it does not produce this effect (g).

Extent of lien.

Primâ facie a clause conferring a lien on shares will extend not only to the shares, but to dividends and other moneys payable in respect of them (h).

Lien of companies governed by particular statutes.

7 Geo. 4, c. 46.

As regards banking companies governed by 7 Geo. 4, c. 46, it is expressly enacted that no claim which any member may have in respect of his share shall be set off either at law or in equity against any demand which the company may have against such member, on account of any other matter or thing whatsoever (i).

8 & 9 Vict.
c. 16.

Unpaid-up shares in a company governed by the Companies' Clauses Consolidation Act, are not transferable so long as anything is due to the company from their holder for calls either upon them or upon any other shares (k). But the company may waive this provision, and if they register a transfer from a member indebted to them the transfer will be valid (l).

Cost-book companies.

Cost-book mining companies are not bound to recognise transfers, unless all calls on the shares transferred, with interest and expenses, have been paid (m).

(e) See *Bank of Africa, Ltd. v. Salisbury Gold Mining Co.* [1892], A. C. 281; *Allen v. Gold Reefs of West Africa, Ltd.* [1900], 1 Ch. 656.

(f) *Stockton Malleable Iron Co.*, 2 Ch. D. 101, which see as to the words "due" and "indebted."

(g) *Lond. Birm. and S. Staff. Bank*, 34 Beav. 332; but see the case in the preceding note.

(h) *Re General Exchange Bank*, 6

Ch. 818; *Hague v. Dandeson*, 2 Ex. 741.

(i) 1 & 2 Vict. c. 96, § 4. See *Ex parte Davidson*, 1 Mon. M. D. & De G. 648; *Ex parte Caldecott*, 2 ib. 368.

(k) 8 & 9 Vict. c. 16, § 16; *Hubbersty v. Manchester, Sheffield, &c., Rail. Co.*, L. R. 2 Q. B. 59 and 471.

(l) *Ex parte Littledale*, 9 Ch. 257.

(m) 32 & 33 Vict. c. 19, § 14.

The Companies Act, 1862, contains nothing on this subject, Bk. III. Chap. 4. Sect. 3.
neither does the Letters Patent Act, 7 Wm. 4 and 1 Vict. c. 73.

But by Table A. to the Companies Act, 1862, it is provided Table A.
that the company may decline to register any transfer
of shares made by a member who is indebted to it (*n*),
that is, at the time when the transfer is sent to the com-
pany for registration (*o*). This article applies to all debts
owing by a member to the company however contracted (*p*),
and whether the debt is owing by him solely or jointly with
others (*q*).

Assuming a company to have a lien on the shares of a Priority of lien
over equitable
charges.
member for all money which he may owe it, let us suppose
that he pledges his shares. The pledgee must be treated as
having notice of the lien, at all events if the lien is given by
the company's regulations; and as regards moneys then due
to the company the lien will prevail. With respect to moneys
not then due to the company, there is more difficulty. It
would be obviously unjust to the company to enable the
member to deprive the company of its lien for money which
afterwards becomes due from him by virtue of his contract of
membership, and it is apprehended that for such a debt the
lien takes priority over the pledge (*r*). But as regards debts
which a company allows a member to contract with it in
respect of dealings and transactions which the company need
not engage in unless it chooses, the case is different. Hence,
if a shareholder pledges his shares and the pledgee gives
notice of the pledge to the company, such pledge is entitled to
priority over any lien of the company for such a debt subse-
quently contracted by the shareholder (*s*). This was recently

(*n*) 25 & 26 Vict. c. 89, Table A.,
cl. 10. This hardly confers a right
to have the shares sold for pay-
ment of the debt. As to the right
to deduct debts from dividends,
see cl. 75. As to obtaining a lien
by an alteration of articles see
Allen v. Gold Reefs of West Africa,
Ld. [1900], 1 Ch. 656, and *ante*,
p. 462.

(*o*) *Re Cawley & Co.*, 42 Ch. D.
209. Compare *Gilbert's case*, 5 Ch. 559.

(*p*) *Ex parte Stringer*, 9 Q. B. D.
436.

(*q*) See *per* Hall, V.-C., in *Bent-
ham Mills Spinning Co.*, 11 Ch. D.
900.

(*r*) An assignee of a share in a
partnership takes only what the
partner is entitled to when paid
out. See *Partn.* p. 366, and § 31 of
the *Partnership Act*, 1890.

(*s*) *Bradford Banking Co. v. Briggs
& Co.*, 12 App. Ca. 29, reversing

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Bradford Bank-
ing Company v.
Briggs & Com-
pany.

decided by the House of Lords in the *Bradford Banking Co. v. Briggs & Co. (t)*. *Briggs & Co.* was a colliery company governed by the Companies Act, 1862. One of its articles of association entitled it to a "first and permanent lien and charge available at law and in equity upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with his bankers as a security for the balance due and to become due on his current account with them. Notice of this pledge was given to *Briggs & Co.* Afterwards, the shareholder became indebted to *Briggs & Co.* for coals sold to him and became bankrupt. *Briggs & Co.* claimed a lien on the shares for the price of the coal in priority to the amount due to the bankers. The House of Lords decided that the bankers had priority over the company, notwithstanding § 30 of the Companies Act, 1862, which enacts that no notice of any trust shall be entered on the register. This section was held not to apply to such transactions.

SECTION IV.—OF CHARGING ORDERS ON SHARES.

Execution for
separate debt of
shareholder.

Shares in public companies are rendered available for the payment of the separate debts of their holders by a very different method from that which used to be applicable in the case of partnerships (*u*). There is no interference with the company or its property by the sheriff; but the judgment creditor applies to one of the judges of the High Court for an order charging the shares of the judgment debtor with

Charging order.

S. C. 31 Ch. D. 19, and affirming S. C. 29 Ch. D. 149. *Miles v. New Zealand, &c., Co.*, 32 Ch. D. 266, is overruled by this decision.

(*t*) See the last note. The case was decided in conformity with *Hopkinson v. Rolt*, 9 H. L. C. 514, the principle of which was also followed in the Scotch case of *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Ca. 53. The rule in *Hopkinson v. Rolt* applies

even where the first mortgagee has covenanted to make further advances to the mortgagor; *West v. Williams* [1899], 1 Ch. 132.

(*u*) See Partn., 5th ed., 356 *et seq.* The law in this respect has now been altered by the Partnership Act, 1890, § 23. The section applies to cost-book mining companies; see Partn., 6th ed., p. 362, and R. S. C. Ord. XLVI. rr. 1a and 1b.

payment of the debt for which judgment has been recovered. Such an order has the effect of a charge made by the debtor himself in favour of the creditor (*x*), subject, however, to this qualification, that no proceedings can be taken to have the benefit of the charge created by the order until the expiration of six calendar months from its date (*y*). Bk. III. Chap. 4.
Sect. 4.

Where shares are charged by a judge's order under 1 & 2 Vict. c. 110, the dividends must nevertheless be paid to the judgment debtor; for he is the person entitled to them at law (*z*), and his receipt discharges the company even in equity (*a*). The payment of dividends to a particular shareholder may, however, be restrained under 5 Vict. c. 5, § 4, or under R. S. C., Order XLVI. (*b*), and an interim order for this purpose can be obtained, although the six months above mentioned have not expired (*c*). Payment of
dividends after
charging order.

As a charging order only affects the interest of the judgment debtor in the shares charged, if he is a trustee of those shares the order is useless to the judgment creditor (*d*), even though the shares in question are the shares necessary to qualify him as a director (*e*). The interest of a *cestui que trust* of shares may, however, be charged by an order in the proper form (*f*); but not, it seems, if his only interest in them is in the produce of their sale (*g*). Interests affected
by charging
order.

Moreover, if the judgment debtor becomes bankrupt and his bankruptcy relates back to a date earlier than the date of the charging order, the charge will not be available against the trustee in bankruptcy (*h*). In cases of
bankruptcy.

(*x*) See *Onslow's Trusts*, 20 Eq. 677.

(*y*) See as to this, *Bristed v. Wilkins*, 3 Ha. 235; *Reece v. Taylor*, 5 De G. & S. 480.

(*z*) See *Fowler v. Churchill*, 11 M. & W. 57; *Churchill v. Bank of England*, ib. 323.

(*a*) See *Bristed v. Wilkins*, 3 Ha. 235.

(*b*) See *infra*, p. 644.

(*c*) See *Watts v. Jeffryes*, 3 Mc. & G. 372; *Brereton v. Edwards*, 21 Q. B. D. 488.

(*d*) *Gill v. Continental Union Gas L.C.*

Co., L. R. 7 Ex. 332; *Cragg v. Taylor*, L. R. 1 Ex. 148, cannot be relied upon since the Judicature Acts, see [1892] 1 Q. B. p. 745.

(*e*) *Cooper v. Griffin* [1892], 1 Q. B. 740; *Howard v. Sadler* [1893], 1 Q. B. 1; *Blakeley Ordnance Co.*, 25 W. R. 111.

(*f*) See *Cragg v. Taylor* (No. 2), L. R. 2 Ex. 131; *South Western Loan Co. v. Robertson*, 8 Q. B. D. 17.

(*g*) *Dixon v. Wrench*, L. R. 4 Ex. 154.

(*h*) *Re O'Shea's Settlement* [1895].

Bk. III. Chap. 4. A charging order may be made against the shares of a lunatic (i).
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Executors. A charging order cannot be made against an executor in respect of a judgment against his testator; unless judgment has been obtained against the executor a charging order cannot be obtained against him (k).

Order nisi. An order *nisi* may be obtained *ex parte*, and without notice to the debtor; and it restrains the company from permitting a transfer of the shares held by the debtor, or by any person in trust for him, until the order is made absolute or discharged; and if the company permits a transfer of the debtor's shares during the continuance of the order, the company becomes liable to the creditor to the extent of the value of the shares transferred (l).

An order *nisi* is to the effect that unless cause be shown to the contrary by the judgment debtor within a given time, the shares in the — company, standing in the name of —, shall be, and shall in the meantime stand, charged with the payment of the amount for which judgment has been recovered (m). The order *nisi* prevents the shares from being transferred or dealt with, and when made absolute the order takes effect from the date of the order *nisi* (n), and cannot be rescinded (o). The order is not "an execution against the goods of a debtor" within § 45 of the Bankruptcy Act, 1883 (p), nor is it a transaction protected by § 49 of that Act (q). For the purpose of obtaining the full benefit of the

1 Ch. 325, and, under § 23 of the Partnership Act, 1890, *Wild v. Southwood* [1897], 1 Q. B. 317.

(i) *Horne v. Pountain*, 23 Q. B. D. 264; *Re Leavesley* [1891], 2 Ch. 1; *Re Sir F. Seager Hunt* [1900], 2 Ch. 54, note.

(k) *Stewart v. Rhodes* [1900], 1 Ch. 386, commenting on *Haly v. Barry*, 3 Ch. 452, and *Finney v. Hinde*, 4 Q. B. D. 102.

(l) 1 & 2 Vict. c. 110, §§ 14 and 15; 3 & 4 Vict. c. 82, § 1. R. S. C. Ord. XLVI. r. 1.

(m) For the form see R. S. C. App. K. No. 27; and see *Fowler v.*

Churchill, 11 M. & W. 57; *Robinson v. Burbidge*, 9 C. B. 289.

(n) *Brereton v. Edwards*, 21 Q. B. D. 488; *Haly v. Barry*, 3 Ch. 452, explaining *Warburton v. Hill*, Kay, 470; *Scott v. Lord Hastings*, 4 K. & J. 633; *Watts v. Porter*, 3 E. & B. 743. See those cases as to the priorities of creditors. See, also, *ante*, notes (d), (f), (g).

(o) *Drew v. Willis* [1891], 1 Q. B. 450.

(p) *Re Hutchinson*, 16 Q. B. D. 515.

(q) *O'Shea's Settlement* [1895], 1 Ch. 325, and *Wild v. Southwood* [1897], 1 Q. B. 317.

order, application must be made to the Court in separate proceedings for a foreclosure or sale (r). Bk. III. Chap. 4.
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If the creditor causes the debtor to be arrested before the shares have been applied in satisfaction of the debt, the benefit of the charging order is lost (s). Effect of arresting debtor.

The statute which enables shares to be charged in the manner above explained, applies only to "public companies;" (t) but there is no statutory or other authoritative definition of this phrase; and questions of considerable difficulty may consequently arise with reference to many companies, as to whether they are "public" or not. What are public companies.

In *Macintyre v. Connell* (u), the Court came to the conclusion, 1, that transferability of shares was not the test of publicity; 2, that the attribute of publicity could not be denied in the case of a company empowered to sue and be sued by a public officer, and required to keep a register of its shareholders and to make official returns of their names and addresses. Macintyre v. Connell.

Taking this decision as a guide, and having regard to the law relating to companies at the time of the passing of the 1 & 2 Vict. c. 110, the following companies must be considered as public companies within the meaning of that Act:— What shares may be charged under 1 & 2 Vict. c. 110.

1. Joint-stock banking companies governed by the 7 Geo. 4, c. 46 (x).

2. Joint-stock companies governed by the Letters Patent Act, 7 Wm. 4 & 1 Vict. c. 73 (y).

3. Incorporated joint-stock companies generally (z). Incorporation itself makes a company a public company; for its

(r) See *Leggott v. Western*, 12 Q. B. D. 287; *Bristed v. Wilkins*, 3 Ha. 235, and *Macintyre v. Connell*, 1 Sim. N. S. 225, 252.

(s) 1 & 2 Vict. c. 110, § 16. But arrest for debt is now only possible in cases excepted by 32 & 33 Vict. c. 62, § 4.

(t) See too R. S. C. Ord. XLVI. r. 3.

(u) 1 Sim. N. S. 225. See also *Carr v. Griffith*, 12 Ch. D. 655.

(x) *Macintyre v. Connell*, 1 Sim. N. S. 225, related to a joint-stock banking company governed by 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 113, and removes the doubts formerly entertained respecting such companies. See *Graham v. Connell*, 19 L. J. Ex. 361.

(y) See *Macintyre v. Connell*, 1 Sim. N. S. 225.

(z) See *Re Lysaght* [1898], 1 Ch. 115, a decision under the Appportionment Act, and cases cited *ante*, p. 10.

Bk. III. Chap. 4. existence is authorised by public authority, viz., the Crown
Sect. 4. or the legislature, and is required by the same authority to be
publicly recognised.

As to cost-book
and other unin-
corporated com-
panies.

Unincorporated companies, not being banking companies, governed by the 7 Geo. 4, c. 46, or companies governed by the Letters Patent Act, are *primâ facie* not public companies (a).

Since the abolition of the old procedure for making a partner's share in the partnership available for his separate debts this question has lost much of its importance. The new procedure introduced by the Partnership Act, 1890, is closely analogous to the procedure in the case of public companies. The procedure applies to cost-book mining companies, and will be found discussed in the volume on Partnership (b).

Attachment of
shares.

Whether shares can be attached in the Lord Mayor's court appears doubtful (c).

Restraining
orders.

In connection with this subject it should be observed that any party interested in any stock or shares can, by filing a proper affidavit and notice, and serving it, restrain any public company from permitting the transfer of any stock or shares standing in the name of any person in the books of such company, or from paying any dividend thereon (d). The mode of procedure is now regulated by R. S. C. Ord. XLVI., to which the reader is referred (e). The restraint is temporary only until the Court itself makes an order.

Interlocutory
injunction.

If a person obtains an interlocutory injunction restraining a shareholder from parting with his shares, he will be liable in damages if the injunction is dissolved at the hearing (f).

(a) See the judgment of *Macintyre v. Connell*, 1 Sim. N. S. 225. & N. 780.

(d) 5 Vict. c. 5, § 4.

(b) Partnership, p. 362 *et seq.*; Partnership Act, 1890, § 23; R. S. C. Ord. XLVI. rr. 1a and 1b.

(e) The old procedure by distringas is abolished.

(f) *Mansell v. British Linen Co. Bank* [1892], 3 Ch. 159.

(c) See *Tredinnick v. Oliver*, 5 H.

SECTION V.—OF THE TRANSFER OF SHARES.

Bk. III. Chap. 4.
Sect. 5.1. *Of ordinary transfers.*

One of the most important distinctions between partnerships and companies is the comparatively unlimited right of members of the latter to transfer their shares (*g*). In what are called scrip companies this right is wholly unlimited; the right to the shares passing by the delivery of the scrip certificate (*h*). In other companies, also, the right to transfer is frequently unfettered.

Right to transfer.

Whether a share in a company is transferable at the will of its owner for the time being, or whether its transfer requires the consent of the other shareholders, or of the directors of the company, depends upon the constitution of each company.

Consent to transfer.

There is nothing to prevent a company by its regulations restricting or modifying the right of transfer. Regulations compelling shareholders at any time during the continuance of the company to transfer their shares, if called upon to do so, to particular persons at a particular price may be valid and are not void as being repugnant to any general law; nor is there anything obnoxious to the bankruptcy law in regulations which *bonâ fide* provide that shareholders shall in the event of bankruptcy sell their shares at a particular price fixed for all persons alike and not shown to be less than the fair price (*i*).

Regulations modifying right of transfer.

Compelling transfer.

Speaking generally, if shares are transferable, and no restriction on the right to transfer them is imposed by the regulations of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot lawfully prevent a transfer, even if they are *bonâ fide* of opinion that it is for the interest of the company that they should do so (*k*). It follows from this, that where no restriction on the right to transfer exists, a transfer to a

No consent requisite.

(*g*) See Partn., p. 21.(*k*) *Cawley & Co.*, 42 Ch. D. 209;(*h*) See *Barclay's case*, 26 Beav. 177; *Grisewood's case*, and *De Pass's case*, 4 De G. & J. 544.*Moffatt v. Farquhar*, 7 Ch. D. 591; *Stranton Iron, &c., Co.*, 16 Eq. 559; *Weston's case*, 4 Ch. 20, reversing(*i*) *Borland's Trustee v. Steel Brothers & Co., Ltd.* [1901], 1 Ch. 279.6 Eq. 238. Compare *Ex parte Parker*, 2 Ch. 685.

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Sect. 5.

Fraudulent
transfers.

Time to consider
transfer.

Director's shares.

Consent
requisite.

pauper, in order to escape from liability, is valid, and cannot be prevented (l). This is certainly going very far; and in cost-book mining companies the legislature has thought fit to interfere, by declaring such transfers fraudulent and void (m). But the company may be precluded from disputing the validity of a transfer by its dealings with the transferee (n).

Notwithstanding the length to which the Courts have gone in holding the right to transfer to be free from all implied restriction, a transfer which is fraudulent in the sense of not being a real transfer out and out, or a transfer made for a fraudulent purpose, can be lawfully objected to by the directors (o). But a transfer to avoid future liability or to multiply votes is held not to be fraudulent (p).

Directors are always entitled to a reasonable time for the consideration of every transfer before they register it (q).

A director has the same right to transfer his shares as any other shareholder has (r).

Where, by the constitution of a company, certain definite restrictions are placed on the right to transfer its shares, the directors have no implied authority to impose any other restrictions on the exercise of that right (s), *e.g.*, if the only restriction is that no calls shall be in arrear, the directors cannot refuse to permit a transfer, if all calls made have been paid. So, again, a right to object to a transferee does not entitle them to object to a transfer to an unobjectionable person, although made for a purpose the directors may disapprove, *e.g.*, to multiply votes (t). Moreover, where, as frequently happens, the restriction is that the directors shall

|| (l) See cases in last note, and *Jefferys v. Smith*, 3 Russ. 158, and *infra*, Bk. IV., c. 1, § 13, B. 1. Compare *South London Fish Market Co.*, 39 Ch. D. 324.

(m) 32 & 33 Vict. c. 19, § 35.

(n) *Chynoweth's case*, 15 Ch. D. 13.

(o) This is admitted in *Weston's case*, 4 Ch. 20. See further under the head Contributories in Bk. IV.

(p) See the last five notes, and *infra*.

(q) *Ottos Kopje Diamond Mines* [1893], 1 Ch. 619; *Société Générale de Paris v. Walker*, 11 App. Ca. p. 41.

(r) *Cawley & Co.*, 42 Ch. D. 209.

(s) This follows from *Weston's case*, *ubi supra*. See also, *Chappell's case*, 6 Ch. 902; *Gilbert's case*, 5 Ch. 559, and the next note.

(t) *Moffatt v. Farquhar*, 7 Ch. D. 591; *Pender v. Lushington*, 6 Ch. D. 70; *Stratton Iron Co.*, 16 Eq. 559.

consent to the transfer, their consent is regarded so much as a mere matter of form, that the necessity for it does not practically affect the marketable value of the shares. Nor can directors withhold their consent to a transfer without good reason; for the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously (*u*). At the same time, if their consent to a transfer is necessary, and in giving (*x*) or refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with (*y*); and, in such a case, it is competent for them, if the company is in embarrassed circumstances, to resolve not to allow any transfers at all (*z*). If the directors refuse their consent to a transfer they are not bound to state the reasons of their refusal even when their power to refuse is limited to particular grounds of objection (*a*); if their conduct is questioned the onus of proving that they have acted improperly is on the person complaining of their conduct (*b*). A director may consent to a transfer of his own shares (*c*), and the transfer will not necessarily be invalid because the consent is given just before a call is resolved upon (*d*). As to consenting to transfers to executors, &c., see below, pp. 649, 650.

A consent to a transfer given and acted upon is not invalid on the ground that it has been given informally (*e*); but a

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Director's shares.

Informal consent.

(*u*) *Ex parte Penney*, 8 Ch. 446; *Poole v. Middleton*, 29 Beav. 646; *Robinson v. Chartered Bank*, 1 Eq. 32; *Pinkett v. Wright*, 2 Ha. 120. See also *Faure Electric Accumulator Co.*, 40 Ch. D. 141.

(*x*) *Faure Electric Accumulator Co.*, 40 Ch. D. 141.

(*y*) *Coalport China Co.* [1895], 2 Ch. 404; *Taft v. Harrison*, 10 Ha. 489; *R. v. Liverpool and Manchester Rail. Co.*, 21 L. J. Q. B. 284; and see *Birmingham v. Sheridan*, 33 Beav. 660. But compare *Stranton Iron Co.*, 16 Eq. 559, *ante*, note (*t*), where, however, the directors had, under the circumstances, no right

to refuse the transfer.

(*z*) *Nelson Mitchell v. City of Glasgow Bank Liquidators*, 4 App. Ca. 624; and see *Mitchell's* and *Rutherford's cases*, *ib.* 548; *Shepherd's case*, 2 Eq. 564, and 2 Ch. 16.

(*a*) *Coalport China Co.* [1895], 2 Ch. 404; *Ex parte Penney*, 8 Ch. 446.

(*b*) See cases in last note.

(*c*) *Bush's case*, 6 Ch. 246, and L. R. 6 H. L. 37; and see *Gilbert's case*, 5 Ch. 559.

(*d*) *Cawley & Co.*, 42 Ch. D. 209. Compare *Gilbert's case*, 5 Ch. 559.

(*e*) *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24. See *ante*, pp. 73 and 74.

Bk. III. Chap. 4. consent fraudulently obtained can be treated by the company as invalid (*f*).
Sect. 5.

Power to refuse when member indebted.

A power to refuse to register a transfer by a member indebted to the company, does not authorise a refusal unless the member was indebted to the company when the transfer in proper form was sent in for registration (*g*).

Payment of calls.

In most companies payment of calls is a condition precedent to the exercise of a right of transferring shares (*h*). A call must be actually made before its non-payment can justify a refusal to permit a transfer (*i*). If calls are due on some only of the shares held by a shareholder he cannot be prevented from transferring other shares on which no arrears are due, unless the statutory or other regulations of the company clearly go to that extent (*k*), as is the case with respect to companies governed by the Companies' Clauses Consolidation Act, 1845, and companies governed by Table A. to the Companies Act, 1862. Such, however, is not the case in companies governed by the Stannaries Act, 1869 (*l*). The right, however, to prevent a transfer of shares on which calls are due may be waived, *e.g.*, by registering the transfer (*m*); and if waived, a transfer of them cannot be afterwards impeached (*n*).

Procuring consent to transfer.

Whether upon the sale of shares it is the business of the buyer or of the seller to procure the consent of the directors to a transfer will be examined hereafter (*o*).

Mode of transferring shares.

Shares in companies are not all legally transferable in the same way: some are transferable by deed only, some by writing not under seal, some apparently by parol. The mode in which the shares of a given company are transferable,

(*f*) See *Payne's case*, 9 Eq. 223; *Ex parte Kintrea*, 5 Ch. 95, and others of that class. A., Art. 10, and *Ex parte Stringer*, 9 Q. B. D. 436.

(*g*) *Cawley & Co.*, 42 Ch. D. 209.

(*h*) See *ante*, p. 591.

(*i*) *Cawley & Co.*, 42 Ch. D. 209; *R. v. Inns of Court Hotel Co.*, 2 N. R. 397, and 32 L. J. Q. B. 369. Compare *Gilbert's case*, 5 Ch. 559.

(*k*) 8 & 9 Vict. c. 16, § 16. *Hubbersty v. Manchester Rail. Co.*, L. R. 2 Q. B. 59 and 471. See also Table

(*l*) 32 & 33 Vict. c. 19, § 14.

(*m*) *Ex parte Littledale*, 9 Ch. 257, and the case in the next note.

(*n*) *Ib.*, and *Orpen's case*, 9 Jur. N. S. 615.

(*o*) See *London Founders' Association v. Clarke*, 20 Q. B. D. 576; *Stray v. Russell*, 1 E. & E. 888; and compare *Wilkinson v. Lloyd*, 7 Q. B. 27, *infra*, pp. 651, 652, and 678.

depends on the constitution of the company, and on the statute, if any, by which it is governed (*p*). Acceptance by the transferee is essential (*q*); but it will be presumed in the absence of evidence to the contrary (*r*). Bk. III. Chap. 4.
Sect. 5.

Shares in companies governed by the Companies' Clauses Consolidation Act are transferable by deed, which must be delivered to the secretary properly executed by the transferor and the transferee, and be properly stamped, and must truly state the consideration (*s*). A form of transfer is given by the Act (*t*). In companies
governed by
8 & 9 Vict.
c. 16.

The Companies Act, 1862, declares that shares in companies formed and registered under that Act shall be capable of being transferred in manner provided by the regulations of the company (§ 22) (*u*). Table A. contains a form of transfer, and requires it to be executed both by the transferor and the transferee (see Nos. 8 and 9). Whether executed means sealed and delivered is, however, left in obscurity (*x*). Shares in these companies cannot, however, be made transferable by mere delivery (*y*), except under the provisions of the Companies Act, 1867, which only applies to fully paid-up shares in limited companies (*z*). In companies
governed by the
Act of 1862.

The Companies' Clauses Consolidation Act, 1845, requires executors to be registered (see § 18), and after they have been registered a transfer to be valid must be executed by all the executors on the register (*a*). Executors or administrators of Transmission to
executors, &c.

(*p*) In *Ex parte Sargent*, 17 Eq. 273, a deed was held not necessary, although the practice was to have one. The articles only required an instrument in writing.

(*q*) See *Cartmell's case*, 9 Ch. 691.

(*r*) *Standing v. Bowring*, 31 Ch. D. 282.

(*s*) *Powell v. London and Provincial Bank* [1893], 2 Ch. 555; *Nanney v. Morgan*, 37 Ch. D. 346, and compare *West v. West*, 9 L. R. 1r. 121. The requirements of the Act as to the stamp and the statement of the consideration are probably directory only; see [1893] 1 Ch. 560, and *ante*, pp. 147, 148.

(*t*) 8 & 9 Vict. c. 16, § 14.

(*u*) The repealed Acts 7 & 8 Vict. c. 110, § 54, and c. 113, § 23, both required transfers to be by deed. See as to scrip, &c., transferable to bearer, *infra*, p. 656, 657.

(*x*) *Ex parte Sargent*, 17 Eq. 273, tends to show that a deed is not necessary.

(*y*) See *General Co. for the Promotion of Land Credit*, 5 Ch. 363; *Reuss v. Bos*, L. R. 5 H. L. 176.

(*z*) See 30 & 31 Vict. c. 131, § 27 *et seq.* As to stamps on share warrants to bearer, see Stamp Act, 1891, § 107 and schedule, and Finance Act, 1899, §§ 4 and 5.

(*a*) *Barton v. L. & N.-W. Rail.*

Bk. III. Chap. 4. Sect. 5. members of companies governed by the Companies Act, 1862, and Table A. may, at their option, either register themselves as members (Table A., No. 13), or transfer the shares which have devolved upon them, without becoming members themselves (Nos. 14 to 16, and see § 24 of the Act (b)). The same observation applies to trustees of bankrupt members, and to persons marrying female members (see Table A., Nos. 13—16). It is to be observed that the power given to directors of declining to register a transfer of shares does not entitle them to decline to register shares in the name of a person claiming them by transmission (c); but if the person so claiming endeavours to combine his title by transmission with some other person's title by transfer, in order to deprive the company of its right of lien, the directors may refuse to register the shares in his name (d).

In other companies.

The transfer of shares in other companies is not regulated by any general Act of Parliament now in force (e). Shares in cost-book mining companies, although usually transferred by some written document, appear to be transferable by parol only (f). Shares in what are called scrip companies are apparently transferable by the delivery of the scrip certificate (g).

Companies formed under the repealed Acts of 1856—8, may cause their shares to be transferred in manner in use before November, 1862, or in such other manner as such companies may direct (h).

Forms of transfer.

The forms of transfer given by the various Acts are short, and are framed with a view to convenient registration; and although shares may be transferred by instruments in other

Co., 24 Q. B. D. 77. The executors were described as executors on the register.

(b) See further as to this *infra*, c. 7, § 1.

(c) *Bentham Mills Spinning Co.*, 11 Ch. D. 900.

(d) *Ex parte Harrison*, 28 Ch. D. 363.

(e) As to agreements for the transfer of shares in banking com-

panies, see 30 Vict. c. 29, noticed *infra*, p. 676.

(f) *Walker v. Bartlett*, 18 C. B. 845. As to stamps see Stamp Act, 1891 (54 & 55 Vict. c. 39), § 110 and sched. Transfer.

(g) *Barclay's case*, 26 Beav. 177; *Grisewood's case*, 4 De G. & J. 544; *De Pass's case*, *ib.*

(h) 25 & 26 Vict. c. 89, § 178.

forms, still, if they are complicated, and differ substantially from those prescribed, the company need not register them (*i*). Bk. III. Chap. 4.
Sect. 5.

Shares standing in the names of trustees or lunatics may be transferred in proper cases under an order of the Chancery Division, or an order in lunacy as the case may be (*k*). Shares of
trustees and
lunatics.

Shares are not held to be goods, wares, or merchandise within the clause in the Stamp Act, exempting contracts for the sale of goods from stamp duty (*l*); and written agreements for their sale must therefore be stamped (*m*). Shares, moreover, are property within the meaning of the Stamp Acts; and instruments of transfer must therefore have the true consideration for the transfer expressed upon them, and be stamped accordingly (*n*). Several shareholders, however, may join in one transfer, and if the stamp covers the total consideration money it is sufficient (*o*). Where shares are themselves the consideration for a purchase, the stamp is regulated by their market value at the time of sale (*p*). An exchange of shares is for the purposes of the Stamp Acts equivalent to a sale (*q*).

A transferee of a share does not become a shareholder, nor does a transferor of a share cease to be a shareholder, until those forms and ceremonies which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by competent authority. The decisions on this subject having been already examined need not be again adverted to (*r*). It is the duty of the transferee to obtain recognition of himself as shareholder (*s*). The transferor When transfer
is complete.

(*i*) *Copeland v. North-Eastern Rail. Co.*, 6 E. & B. 277; *R. v. General Cemetery Co.*, ib. 415.

(*k*) See as to lunatics, *ante*, p. 57, and as to trustees, *ante*, p. 630.

(*l*) *Knight v. Barber*, 16 M. & W. 66.

(*m*) *Ib.* See also Stamp Act, 1891, 54 & 55 Vict. c. 39, §§ 52 & 53 and sched., imposing a duty on contract notes for the sale of stock.

(*n*) See Stamp Act, 1891, 54 & 55 Vict. c. 39, under the head Conveyance and Mortgage, and as to

penalties for registering insufficiently stamped transfers see § 17.

(*o*) *Wills v. Bridge*, 4 Ex. 193.

(*p*) See Stamp Act, 1891, § 55, and *Ulverstone Rail. Co. v. The Commissioners of Inland Revenue*, 2 H. & C. 855.

(*q*) *Coats v. Inland Revenue*, [1897], 2 Q. B. 423, affirming [1897] 1 Q. B. 778.

(*r*) *Ante*, Bk. I., c. 2, § 2, and see *infra*, Bk. IV., c. 1, § 13, B. 1.

(*s*) See *Skinner v. City of London Marine Corporation*, 14 Q. B. D. 882;

Bk. III. Chap. 4. must ascertain by inquiry whether his transfer has been
Sect. 5. accepted by the company or not; it is not the duty of the company to give him this information if he does not ask for it (t).

Companies Act, 1867, § 26. The Companies Act, 1867, § 26, obliges companies registered under the Companies Act, 1862, to register a transfer on the application of the transferor in the same manner and subject to the same conditions as on the application of the transferee.

Transferee's right to be registered. A transferee has a right to be registered subject always to the conditions of the Company's Act, charter, or regulations; and this right can be enforced by action of *mandamus* (u); or in companies governed by the Companies Act, 1862, by an application under § 35 to rectify the register (x). But the company is entitled to a reasonable time to ascertain that all is right before it registers a transfer (y); and in practice notice is usually sent to the transferor that a transfer of his shares has been lodged for registration (z).

Rights of the transferee. The transferee of a share in a company acquires, as a rule, no greater rights than the transferor (a); and this doctrine has been carried so far that it has been held that a transferee is precluded from objecting to conduct which has been sanctioned or acquiesced in by his transferor (b); but this may well be doubted (c). The extent to which a transferee of shares takes upon himself the liabilities of the transferor, is examined in other parts of the treatise (d); it may, however, be observed generally, that the transferee, as between himself and his transferor, takes the place of the latter, not only as regards what is past, but also as regards what is to come (e). With

Ward and Henry's case, 2 Ch. 431, 438. *infra*, pp 658 *et seq.*

(t) See *Gustard's case*, 8 Eq. 438.

(u) See *ante*, p. 81, and *infra*, c. 9, § 4.

(x) See *ante*, pp. 165 *et seq.*

(y) See *Ottos Kopje Diamond Mines* [1893], 1 Ch. 619, and *per* Lord Blackburn, in *Société Générale de Paris v. Walker*, 11 App. Ca. 41.

(z) See 11 App. Ca. pp. 34 *et seq.*

(a) See further on this point,

(b) *Ffooks v. South-Western Rail. Co.*, 1 Sm. & G. 168. See, also, *Peek v. Gurney*, 13 Eq. 79, and L. R. 6 H. L. 377.

(c) See *per* Fry, L. J., in *Ashbury v. Watson*, 30 Ch. D. 379 & 386.

(d) See as to creditors, *ante*, Bk. II., c. 7, § 3; as to calls, *ante*, Bk. III., c. 3, § 2, and *post*, Bk. IV., c. 1, §§ 13 & 14.

(e) See *Mayhew's case*, 5 De G. M. & G. 837.

respect, however, to the title of a transferee, it will be seen presently that a *bonâ fide* purchaser of shares for value without notice of any invalidity in the title of his transferor, acquires a title which cannot be impeached by persons claiming a prior equitable interest (*f*); moreover, if the company has actually registered such a purchaser, in ignorance of material facts, the company cannot lawfully afterwards remove his name from the register (*g*).

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Where any company is being wound up by the Court, or subject to the supervision of the Court, all transfers of shares in it subsequent to the presentation of the petition, and prior to the winding-up order, are invalid unless otherwise ordered by the Court (*h*). Transfers after the winding-up order, though not expressly prohibited, are prohibited by implication (*i*). Such a transfer, unless sanctioned by the Court, does not discharge the transferor from liability to be put on the list of contributories as a present member (*k*); nor does it give the transferee a right to be put on the register without the sanction of the Court, and such sanction will not be given except on strong grounds (*l*). After a resolution to wind up voluntarily transfers of shares, unless to, or with the sanction of, the liquidators, are also invalid (*m*). The effect of these provisions upon the question whether a buyer or seller ought to be put on the list of contributories will be examined hereafter (*n*).

Transfers when
company is being
wound up.

Having made the above observations on ordinary transfers, it is necessary to consider the important and difficult questions which arise when transfers are executed in blank, and when transfers are forged. The title acquired to shares by estoppel will be examined in the course of this inquiry.

(*f*) See the next heading.

(*g*) *Ward v. South-Eastern Rail. Co.*, 2 E. & E. 812, where a fraud had been committed on the company.

(*h*) 25 & 26 Vict. c. 89, § 153.

(*i*) *Onward Build. Soc.* [1891], 2 Q. B. 463.

(*k*) See 25 & 26 Vict. c. 89, §§ 38,

74, & 84.

(*l*) *Onward Build. Soc.* [1891], 2 Q. B. 463.

(*m*) 25 & 26 Vict. c. 89, § 131. See *Taylor's case* [1897], 1 Ch. 298, reversing [1896] 2 Ch. 851.

(*n*) See *infra*, Bk. IV., c. 1, § 13, B. 1.

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2. Of transfers in blank.

Transfers in
blank.

Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is a common practice for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on. The effect of executing transfers in blank, and handing them from one person to another, is very different with respect to different classes of shares.

In the first place there are shares (*e.g.*, shares in scrip and cost-book mining companies) which are transferable without the intervention of any formal document; and a letter signed by a shareholder, and transferring his shares to —, amounts, if delivered to a purchaser, to a transfer to him, and authorises him to fill up the blank with any name he likes (*o*).

Blank deeds of
transfer.

But let us suppose a deed to be required. A deed executed by A., and purporting to transfer property to —, *i.e.*, to nobody, is altogether inoperative as a deed; and consequently, if a shareholder in a company, the shares in which are transferable by deed only, executes a transfer of his shares in blank, he still remains legal owner of the shares, and the holder of the deed acquires no other title to the shares than a right to have them properly transferred, or to have the transferor declared a trustee of them (*p*). But although a blank deed is invalid as a deed, it by no means follows that all transfers in blank are worthless.

First circumstances may be proved which justify the

(*o*) See *Walker v. Bartlett*, 18 C. B. 345; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

(*p*) *Société Générale de Paris v. Walker*, 11 App. Ca. 20; 14 Q. B. D. 424; *Powell v. London and Provincial Bank* [1893], 2 Ch. 555; *Nanney v. Morgan*, 37 Ch. D. 346; *Hibblewhite v. McMorine*, 6 M. & W.

200; *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blane*, 14 Q. B. 205, and 6 Ra. Ca. 79. See, too, *Consols Insur. Assoc. v. Newall*, 3 Foa. and Fin. 130, and *Swan's case*, 7 C. B. N. S. 400, and *Swan v. North British Australian Co.*, 7 H. & N. 603, noticed *infra*, p. 672.

inference that the instrument has been re-executed since the blanks were filled up (*q*). This inference may be drawn if the transferor has recognised the transfer since he knew that it was filled up, and how, but not otherwise (*r*). Bk. III. Chap. 4.
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In the next place, the equitable ownership in shares agreed to be sold depends on the contract of sale and not on the form of transfer; and as there is no law requiring a contract for the sale of shares to be by deed or even in writing, there is nothing to prevent a purchaser of shares from being held to his bargain, nor from being ordered to accept the shares he has agreed to buy, and with them all the liabilities incident thereto. Consequently, where there is a binding agreement for the sale and transfer of shares, it is comparatively immaterial as between the buyer and the seller whether a transfer in blank has been executed or not. The purchaser can be compelled at the instance of the seller to take his place as from the time of the making of the contract; in other words, the purchaser will be compelled to accept a proper transfer of the shares, to procure himself to be registered as a shareholder in respect of them, and to indemnify the seller from all liabilities accruing in respect of the same shares since the time when they were agreed to be sold (*s*). So the purchaser can compel the seller to execute a proper transfer and to account for all dividends received by him since he ceased to be the equitable owner of the shares. Effect in equity
of transfers in
blank.

Similar observations apply to transfers in blank by way of pledge for money actually advanced.

Where, however, there is no valid contract, a transfer in blank of shares not passing by delivery is as invalid in equity as at law, unless the transferor has so acted as to estop himself from disputing its validity.

(*q*) See *Hudson v. Revett*, 5 Bing. 368.

(*r*) *Société Générale de Paris v. Walker*, *ubi supra*; *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555.

(*s*) *Morris v. Cannan*, 4 De G. F. & J. 581. See *Cheale v. Kenward*, 3 De G. & J. 27; *Wynne v. Price*

3 De G. & S. 310; *Shaw v. Fisher*, 5 De G. M. & G. 596, affirming S. C. 1 Jur. N. S. 971, and 2 De G. & Sm. 11. See, also, *Contract Corporation*, 3 Ch. 105. In *Jackson v. Cocker*, 4 Beav. 59, a purchaser of scrip was held to be under no such obligations; but see *Beckett v. Bilbrough*, 8 Ha. 188. As to debentures

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*Tayler v. Great
Indian Peninsula
Railway Com-
pany.*

This is well illustrated by the case of *Tayler v. Great Indian Peninsula Railway Company* (t). In that case the plaintiff, who was entitled to some 20l. and some 2l. shares in a company, directed his broker to sell the latter. The broker obtained forms of transfer, stamped sufficiently to pass the 20l. shares; and the plaintiff executed these forms, leaving the blanks to be filled in by the broker. The broker inserted the description of the 20l. shares, but left the names of the transferees still in blank. The shares were then sold, and the names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. The plaintiff having discovered that the wrong shares had been sold, filed a bill to set aside the sale, and to have the transfers delivered up, and to restrain their registration. A decree was made in his favour by the V.-C. Wood, and an appeal from this decision was dismissed.

Transfers in
blank not
negotiable.

A transfer in blank is in practice generally accompanied by the certificate of the transferor's ownership of the shares to which the transfer relates. Attempts have frequently been made to induce the Courts to hold that a transfer executed by a transferor in blank as regards the transferee and accompanied by the transferor's share certificates are negotiable instruments transferable by delivery, and conferring a good title to the shares mentioned in the transfer to any *bonâ fide* holder of the documents without notice of any defect in the title of the person from whom he receives them. These attempts, however, have as yet invariably failed (u).

Except under the provisions of the Companies Act, 1867, which authorise the issue of share warrants to bearer in the case of shares or stock fully paid up (x), shares transferable to bearer can hardly exist; for they are not consistent with the

issued in blank, see *Davis v. Martin*, [1894], 3 Ch. 181, and *ante*, p. 307.

(t) 4 De G. & J. 559. See further as to forged transfers, *infra*, pp. 667 *et seq.*

(u) *Williams v. Colonial Bank*, 38 Ch. D. 388; affirmed *sub. nom. Colonial Bank v. Cady*, 15 App. Ca. 267; *France v. Clark*, 26 Ch. D.

257; *London and County Bank v. London and River Plate Bank*, 20 Q. B. D. 232, and 21 ib. 535; *Colonial Bank v. Hepworth*, 36 Ch. D. 36.

(x) 30 & 31 Vict. c. 131, §§ 27—36. As to stamps thereon see ib. § 33, and Stamp Act, 1891, § 107 and schedule, and Finance Act, 1899, §§ 4 and 5.

statutory enactments relating to registers. But regulations might be made to the effect that share certificates should be transferable to bearer; and that the bearer should be entitled to be registered; but that the persons on the register should alone be members of the company. Such certificates or the share warrants above referred to might then become negotiable by usage.

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It has indeed been decided that scrip certificates (*y*) and debentures to bearer (*z*) of an English company, scrip certificates of a foreign loan (*a*), bonds of a foreign bank (*b*), and bonds or debentures of a foreign company (*c*), may be proved to be negotiable by the general usage of merchants in this country (*d*), where there is no enactment or agreement to the contrary (*e*); and where this is proved, the title of a *bonâ fide* purchaser for value of the instrument in question, without notice of any infirmity in the title of the seller, will be unimpeachable, even although the seller himself had no title (*f*).

Documents
negotiable
by custom.

A person, who signs a transfer in blank and gives it with the certificate of shares to another person, does in fact enable that person to insert his own name in the transfer as transferee and to take the transfer so filled up with the certificate to the company and procure himself to be registered as owner. Nay more, the person, to whom the transfer is handed, may, without filling it up with his own name, pass it and the certificate on to a third person, and he may do the like, and ultimately some holder of the transfer may fill in his own name and procure himself to be registered. Such transactions are of daily occurrence, and give rise to no difficulty where each step in the transaction is honest and in accordance with the real

Effect of transfers in blank as regards third parties.

(*y*) *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

(*z*) *Bechuanaland Exploration Co. v. London Trading Bank* [1898], 2 Q. B. 658.

(*a*) *Goodwin v. Roberts*, 1 App. Ca. 476.

(*b*) *London Joint Stock Bank v. Simmons* [1892], A. C. 201.

(*c*) *Venables v. Baring Brothers* [1892], 3 Ch. 527; *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120.

(*d*) That the custom must be a

custom in this country, see *Picker v. London and County Banking Co.*, 18 Q. B. D. 515; *Colonial Bank v. Cady*, 15 App. Ca. 267.

(*e*) *Crouch v. Crédit Foncier of England*, 8 Q. B. 74, *contra*, has been overruled. See [1898], 2 Q. B. 658.

(*f*) *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *London Joint Stock Bank v. Simmons* [1892], A. C. 201, and other cases in notes (*z*) to (*c*), *ante*.

Bk. III. Chap. 4. intention of the parties to it (*g*). But where this is not the
 Sect. 5. case, questions of great difficulty arise. The principles to be borne in mind for the purpose of solving them may be gathered from the following considerations and authorities.

Title acquired
 by purchasers
 under blank
 transfers, &c.

Except where a shareholder is estopped from denying the title of some particular transferee (*gg*), the general rule of English law is that a purchaser of a share acquires no better title than his vendor himself has (*h*); shares being in this respect like other goods and chattels (*i*). As regards ordinary goods there are three exceptions, viz., 1, where they are bought in market overt; 2, where they are bought from agents entrusted with them and who by the Factors Acts can make a good title by sale or pledge; 3, where the equitable title is in one person and the legal title is in another and is acquired by a purchaser *bonâ fide*, and without notice of the equitable title.

Factors Acts.

The Factors Acts do not it seems apply to shares (*k*).

Market overt.

A sale in market overt (if proved) followed by delivery would, it is presumed, protect a buyer; but no decision upon the point is known to the author. The exception in question does not apply to pledges (*l*).

Purchasers for
 value without
 notice.

The equitable doctrines applicable to purchasers for value without notice apply to shares as well as to other property; shares not being for this purpose regarded as mere choses in action (*m*). In applying those doctrines the following points must be borne in mind, viz.,—

Legal title or
 right thereto
 must be
 acquired.

1. The purchaser must have acquired the legal title to the shares, or at all events an absolute and unconditional legal right to be registered in respect of them (*n*).

(*g*) See the cases cited below and *Roffe v. Roscoe*, referred to in 26 Ch. D. 265, where the transferor authorised what the transferee did.

(*gg*) As to the general principles of estoppel applicable, see *Carr v. L. & N. W. Rail. Co.*, L. R. 10 C. P. 307; *George Whitechurch, Ltd. v. Cavanagh*, 17 Times L. R. 746; *Farquarson Brothers & Co. v. King & Co.* [1901], 2 K. B. 697; and *infra*, p. 671.

(*h*) *Colonial Bank v. Cady*, 15 App. Ca. 267, and other cases cited below.

(*i*) As to which see *Cole v. North-Western Bank*, L. R. 10 C. P. 354.

(*k*) See 38 Ch. D. 408.

(*l*) *Ib.* 405. *Qu.* if there is a market overt for shares.

(*m*) See the cases *infra*, and *Taylor v. Blakelock*, 32 Ch. D. 560, a case of stock; *London and County Banking Co. v. London and River Plate Bank*, 20 Q. B. D. 232, and 21 *ib.* 535.

(*n*) *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120; *Moore v. North-Western Bank* [1891], 2

2. This legal title or right must have been acquired without notice of the equitable title affecting the shares (*o*); and without notice of such circumstances as rendered it reasonable to inquire into the title of the transferor (*p*). If the legal title or right is acquired with notice of a prior equitable title the latter will of course prevail (*q*).

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Without notice.

3. A person who knowingly accepts the share certificates of a transferor from the holder of a blank transfer, has notice that the holder is not the owner of the shares, and that the transferor's legal title is still in him (*r*).

As to notice
from transfer
in blank.

4. Where registration is necessary to complete the title of a transferee, a person who accepts a transfer (whatever its form) does not acquire the legal title until he is registered as owner (*s*).

Where registra-
tion is necessary
to complete title.

5. Where, as under the Companies Clauses Consolidation Act, 1845, a legal transfer can only be effected by deed, a person to whom shares have been transferred by an instrument which is invalid as a deed does not acquire the legal title by being registered as owner (*t*).

Where transfer
by deed is
necessary to
give legal title.

Ch. 599; *Roots v. Williamson*, 38 Ch. D. 485; *Société Générale de Paris v. Walker*, 14 Q. B. D. 424, and 11 App. Ca. 20; *Donaldson v. Gillot*, 3 Eq. 274. Observe that in this case the transferor (Govett) executed two transfers. The second under which the defendant claimed was invalid; the first under which the plaintiff claimed was valid.

(*o*) Signature by a bank manager as "manager in trust" does not give notice of the existence of any trust in favour of third persons. *London and Canadian, &c., Co. v. Duggan* [1893], A. C. 506.

(*p*) See *per* Lord Bramwell, 13 App. Ca. 345-6, and see *London Joint Stock Bank v. Simmons* [1892], A. C. 201; *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120, and generally as to notice in mercantile matters, *Manchester Trust v. Furness* [1895], 2 Q. B. 539; *English and Scottish, &c., Investment Co. v. Brunton* [1892], 2 Q. B. 700.

(*q*) *Nanney v. Morgan*, 37 Ch. D. 346, where the person acquiring the legal title had made a voluntary settlement of the shares whilst he was their equitable owner. *Dodds v. Hills*, 2 Hem. & M. 424, where the purchaser had notice before he was registered, and *Moore v. North-Western Bank* [1891], 2 Ch. 599, where notice of the earlier title was given to the company before the directors had approved the transfer sent in by the purchaser. Their approval was necessary to its validity.

(*r*) See *France v. Clark, infra*, p. 662; *Pearson v. Scott*, 9 Ch. D. pp. 202, 203; *Fox v. Martin*, W. N. 1895, p. 36. As to estoppel, see *Colonial Bank v. Cady, infra*, p. 665, and *infra*, pp. 671 *et seq.*

(*s*) *Nanney v. Morgan*, 37 Ch. D. 346; *Société Générale de Paris v. Walker*, 11 App. Ca. 20, and 14 Q. B. D. 424; *Roots v. Williamson*, 38 Ch. D. 485.

(*t*) *Powell v. London and Provincial*

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When legal
right is
acquired.

6. If the transfer is duly executed and the transferee has the transferor's share certificates, and the directors have no power to refuse their consent to the transfer, or having such power, have approved thereof, the transferee has an absolute and unconditional legal right to complete his title; but he has no such right if the transfer is not in proper form, or if the transferee has not got the certificates, and the company has not waived their production; or if the directors, having a right to refuse their consent to the transfer, have not considered and approved it (x).

In cases of theft.

7. A person who has property stolen from him and gets it back, even though he is not aware of the theft or restitution, is in the same position as a *bonâ fide* purchaser of it. Whether he has the legal title or notice of titles created between the date of the theft and restitution, depends on the nature of the property and the facts of each case (y).

Companies Act,
1862, § 30.
Notices to
companies.

The effect of giving or not giving notice to a company registered under the Companies Act, 1862, was much discussed in the *Société Générale de Paris v. Walker* (z), which will be noticed presently. The Court of Appeal decided, and Lords Selborne and Blackburn (a) agreed with them, that no priority was gained by an equitable mortgagee of shares giving the company notice of his equitable claim, and that no priority was lost by omission to give such notice; and that having regard to § 30 of the Companies Act, 1862, companies governed by that Act cannot be affected by notices of trusts or of equitable titles. This has always been and is the author's opinion (b), and the same observation applies to companies governed by 8 & 9 Vict. c. 16 (see § 20). But as already seen, companies cannot take advantage of this doctrine to acquire priority in

Bank [1893], 2 Ch. 555; *France v. Clark*, 26 Ch. D. p. 262.

(x) *Moore v. North-Western Bank* [1891], 2 Ch. 599, and cases in note (s).

(y) *London and County Banking Co. v. River Plate Co.*, 21 Q. B. D. 535, and 20 ib. 232, where some of the securities were negotiable and were not the same as those stolen; and *Colonial Bank v. Hepworth*, 36

Ch. D. 36, noticed *infra*, p. 666.

(z) 11 App. Ca. 20, and 14 Q. B. D. 424. See *infra*, p. 663.

(a) See 11 App. Ca. pp. 30 & 41. In *The Bradford Banking Co. v. Briggs & Co.*, 12 App. Ca. 29, some members of the House of Lords seemed indisposed to accept this view of the Acts.

(b) See 14 Q. B. D. 424.

their own favour over equitable rights against the company of which their directors or agents have actual knowledge (c). Moreover, if the company has such actual knowledge that it must know that a proposed transfer is a breach of trust, the section in question does not relieve it from responsibility if with such knowledge it registers the transfer (d).

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Let us now attempt to apply the principles above mentioned to sales and pledges, and to other cases where shareholders have left their transfers and certificates with persons who have improperly used them.

1. In the first place the shareholder signing the transfer in blank may give it with the certificate to a buyer. In such case the buyer is impliedly authorised by the seller to deal with the documents as his own. He can consequently insert his own name and procure himself to be registered as owner; or he can pass the documents on to some one else to deal with in a similar way. In the case supposed, the original shareholder has transferred his right to the documents, and although he remains the legal owner of the shares, he is a trustee of them for the buyer or for the persons claiming under him as the case may be (e).

Sales.

2. Secondly, the shareholder signing the transfer in blank may deposit it and his share certificates as a security for money (f). The real authority given to the pledgee may simply be to hold the documents as a security. But if he fills in his own name as transferee and procures himself to be registered as owner, his title as owner is apparently perfect; and although so long as he holds the shares they are subject to redemption, yet if he then transfers them to a *bonâ fide* purchaser for value without notice of his real title, his mortgagee will, it is conceived, be without redress against such a purchaser (g). If, however, the mortgagee disposes of the transfer and certificate whilst they are in the state in which he received them from his mortgagor, the documents themselves

Pledges.

(c) *Bradford Banking Co. v. Briggs & Co.*, 12 App. Ca. 29, *ante*, p. 640.

(d) *Simpson v. Molson's Bank* [1895], A. C. 270.

(e) The cases cited below are really authorities for this statement,

although none are directly in point.

(f) As to the rights of a mortgagee of shares, see *ante*, p. 634.

(g) See the judgments in the cases next cited, and *Robinson v. Montgomery Brewery Co.* [1896], 2 Ch. 841.

Bk. III. Chap. 4. show that the mortgagee is disposing of what is not his own, and the purchaser from him acquires no better title than the mortgagee himself had, unless he can show that the mortgagor is estopped from asserting his title (*h*).

France v. Clark. This was decided in *France v. Clark* (*i*). In that case France was the registered owner of some shares in a company registered under the Companies Act, 1862. He signed a transfer of them with the name of the transferee and the date, and the consideration all in blank; and he gave this document and his share certificates to Clark as a security for 150*l*. Clark deposited the same documents unaltered with Quihampton as a security for 250*l*. Clark died insolvent. Quihampton then inserted his own name in the transfer, filled in the date, and sent it to the company for registration. The company sent France the usual notice that the transfer had been received, and he stopped the registration of the transfer (*k*). France demanded the shares from Quihampton on payment of the 150*l*. and interest. Quihampton required 250*l*. and interest, and insisted that he was a *bonâ fide* purchaser for value of the shares without notice of France's title. It was, however, decided that although this might have been true if Clark had procured himself to be registered as owner before pledging the shares, yet that the blank transfer and certificate showed that France was the owner and not Clark, and consequently Quihampton's title was no better than Clark's, and that on paying 150*l* and interest, France was entitled to the shares. Lord Selborne in giving the judgment of the Court of Appeal said, "The defence of purchaser for value without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us altogether untenable." This decision has been followed by others which afford further illustration of the important principle above enunciated.

Notice given by
the blanks.

(*h*) See as to this, *infra*, p. 665, and pp. 671 *et seq.*

(*i*) 26 Ch. D. 257, and 22 ib. 830, followed in *Fox v. Martin*, W. N. 1895, p. 36. *Ex parte Sargent*, 17 Eq. 273, if opposed to this cannot

be relied upon.

(*k*) The registration, however, seems to have been effected in fact, see 26 Ch. D. 261. Compare *Colonial Bank v. Cady*, noticed *infra*, p. 665.

In *The Société Générale de Paris v. Walker* (l), A. was the registered owner of 100 shares in a company registered under the Companies Act, 1862. The shares were transferable by deed. A. executed a transfer of them in blank and deposited the transfer and his share certificates with B. as a security for a debt. A. then executed another transfer in blank as regards the name of the transferee and the numbers of the shares, and deposited it with his bankers, giving them a memorandum as to the shares and an excuse for not handing over his share certificates; afterwards the name of an officer of the bank and the numbers of the shares were inserted in this last transfer, and it was sent to the company for registration. Before, however, it was registered B.'s executors gave the company notice of their title, and thereupon the company declined to register the bank's nominee. The bankers then sued the company and B.'s executors, and claimed a declaration that they were entitled to the shares and for delivery of the certificates to them. But it was decided that the bankers had not acquired either the legal title to the shares nor the equitable title to them. Not the legal title, because the transfer was void as a deed (m); not the equitable title, because that title was subsequent in point of time to B.'s equitable title, which there was nothing to displace. The House of Lords held that as the bankers never had the share certificates they would not have been in a position to compel the company to register them as owners of the shares, even if the transfer itself had been by deed duly executed, for the company was entitled to reasonable time for inquiry and to an indemnity even before they received notice from B.'s executors not to register the transfer of the bank (n).

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Blank transfer
without certi-
ficate.

*Société Générale
de Paris v.
Walker.*

3. A registered owner of shares may send a blank transfer with his share certificates to a broker for sale or mortgage, and the broker may exceed his authority, or may sell or mortgage pursuant to it, and misapply the money he receives. According to *France v. Clark* the person dealing with the broker and

Other improper
dealings with
share transfers,
&c.

(l) 11 App. Ca. 20, affirming S. C., 14 Q. B. D. 424. See, also, *Roots v. Williamson*, 38 Ch. D. 485.

(m) See, too, *Powell v. London and Provincial Bank* [1893], 2 Ch. 555.

(n) See, per Lord Selborne, 11

App. Ca. 29, and per Lord Blackburn, ib. p. 41, and *Ottos Kopje Diamond Mines*, [1893] 1 Ch. 619.

See, too, *Moore v. North-Western Bank* [1891], 2 Ch. 599.

Bk. III. Ch. p. 4. taking the blank transfer from him obtains no better title to the shares than the broker is authorised to confer. If he has no authority to sell without further orders he can confer no good title; if he has authority to sell he can sell but not pledge; if he has authority to pledge on behalf of his principal he cannot pledge for his own debt (o).

Advances
by bankers
to brokers.

Earl of Sheffield
v. London Joint
Stock Bank.

In *The Earl of Sheffield v. The London Joint Stock Bank* (p), the plaintiff gave *Easton* authority to borrow 26,000*l.* for him on the security of certain bonds, stocks, and shares of foreign companies, and gave him (*Easton*) transfers executed in blank and share certificates. *Easton* raised 26,000*l.* on them by depositing them with *Mozley*, a money dealer. *Mozley* deposited them with other securities belonging to other customers with various banks as security for loans to himself to a large amount. The transfers were filled in with the names of officials of the banks, and were registered in their names. *Mozley* failed, and the banks claimed to retain the shares, &c., as security for what was due to them respectively from *Mozley*. The plaintiff sought to redeem his bonds and shares on payment of the 26,000*l.* which *Mozley* had advanced upon them, with interest on that sum. The Court of Appeal decided in favour of the banks on the ground that they were purchasers for value without notice; but the House of Lords reversed this decision on the ground that the banks had notice that *Mozley* was pledging shares, &c., which were not his own; and that there was no proof of any authority, by custom or otherwise, enabling *Mozley* to pledge his customers' shares, &c., for more than he himself advanced upon them.

Subsequent
decisions.

The decision, however, of the House of Lords went entirely on the fact of notice in that particular case (q). Subsequent decisions show that if bankers *bonâ fide* and in the ordinary course of business make advances to a broker on the deposit

(o) *France v. Clark* was followed in *Fox v. Martin*, W. N. 1895, p. 36. But see as to estoppel, *infra*, p. 665 and pp. 671 *et seq.*

(p) 13 App. Ca. 333, reversing *Easton v. London Joint Stock Bank*, 34 Ch. D. 95. Some of the documents deposited were negotiable

securities; but the House of Lords made no distinction between them and the others.

(q) *London Joint Stock Bank v. Simmons* [1892], A. C. 201, reversing *Simmons v. London Joint Stock Bank* [1891], 1 Ch. 270. The bonds in this case were negotiable.

of shares, stocks, or securities, they are not, in the absence of any reason to suspect that the broker is acting improperly, bound to inquire whether he has or has not the right to pledge such stocks, shares, or securities for his own debt. If, therefore, the securities so pledged are negotiable instruments, or if the bankers obtain the legal title to the stocks or shares without notice of any prior claim, the bankers will be entitled to hold them as security for the whole of the debt due to them from the broker, though the broker had no right or authority to pledge them for more than was due to himself from the owner of them (r).

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It is said that if a shareholder in an American company signs transfers in blank, and gives them with his share certificates to another, the transferor impliedly authorises that other to deal with them as he chooses (s). But whether this is so or not by the law of America, the title of a person who acquires such documents in this country is governed by the law of this country, and he can acquire no better title than his transferor himself has, unless indeed the owner of the shares has so conducted himself as to be estopped by the law of this country from denying the title of the transferee.

Shares in foreign
companies.

The leading case on this head is *Colonial Bank v. Cady* (t). There *Williams* was the registered holder of shares in an American company. He died, and his executors signed a transfer of the shares in blank, and sent them with share certificates made out in *Williams*' name to *Thomas & Co.* (sharebrokers) for transmission to America; so that the shares might be registered in the names of the executors themselves. *Thomas & Co.* deposited the documents with their bankers in London as security for advances, and then became bankrupt. *Williams*' executors claimed the certificates from the bankers, and were held entitled to recover them. The Court of Appeal

*Colonial Bank
v. Cady.*

(r) *Ib.*, and *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 121. No question arose in this case as to transfers in blank, the shares had been transferred to, and were registered in the names of, trustees for the bank. As to moneys paid into a bank by a stockbroker, *Thomson v. Clydesdale*

Bank, Ltd. [1893], A. C. 282. See, too, *Mutton v. Peat* [1900], 2 Ch. 79.

(s) See the next two cases, and *Stern v. Regina* [1896], 1 Q. B. 211.

(t) 15 App. Ca. 267, affirming same case *sub. nom.* *Williams v. Colonial Bank*, 38 Ch. D. 388; reversing S. C., 36 Ch. D. 659.

Bk. III. Chap. 4. decided that the documents were not negotiable instruments;
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that the bankers had no better title to the documents than *Thomas & Co.* had; that the Factors' Acts did not apply; and that the executors were not estopped by what they had done, nor by having left the documents with *Thomas & Co.* for a considerable time, from denying the title of the bankers. This last point was the most difficult; but the transfers were signed by the executors, and the share certificates were in the name of the deceased; and the evidence showed that in this state the documents were not "in order," i.e., that business men would not take them without inquiry. The House of Lords affirmed the decision: they held that as the evidence showed that transfers might be signed by executors either for the purpose of selling the shares or for the purpose of being registered in respect of them, there was no estoppel; they also expressed a strong opinion that if the transfers had been signed by the registered owner there would have been an estoppel, for he could only have signed with an intention of transferring the shares to some one else, and the evidence showed that the documents would then have been "in order" (u).

Colonial Bank
 v. Hepworth.

The Colonial Bank v. Hepworth (x), was another case arising from *Thomas & Co.*'s misconduct. There *Hepworth* employed *Thomas & Co.* to buy shares in American companies for him. They did so, and received from the sellers transfers executed by them in blank and their share certificates. *Thomas & Co.* retained these documents for *Hepworth* in order to procure registration in his name. Instead, however, of doing so, *Thomas & Co.* pledged them with their bankers for an advance. *Thomas & Co.* afterwards got the documents back from the bankers by a false representation, and sent the documents with *Hepworth's* name filled in to the company's agents for registration, in *Hepworth's* name, and they were so registered (y). The bankers then claimed the shares from *Hepworth*, but it was decided that he was entitled to retain them. He had obtained the legal title *bonâ fide* for value, and without notice of the equitable title of the bankers (z).

(u) The Court of Appeal doubted this. See 38 Ch. D. p. 400, and pp. 405-407.

(x) 36 Ch. D. 36.

(y) See 36 Ch. D. 39.

(z) See, also, *London and County*

3. *Of forged transfers.*

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A forged transfer is no transfer, and is simply a void document, in no way affecting the title of the person whose name is forged.

Forged transfers.

If the officer of a company, acting upon the faith of a forged transfer or power of attorney, wrongfully but innocently transfers the shares of one of its shareholders, the company is liable to make good the loss (a); and an action will lie against the company to compel it to replace the shares, and to pay to the plaintiff the dividends declared since the transfer (b). The transferee need not be a party to such an action, but he may be added as a third party under Ord. XVI., r. 48 (c). As regards the Statute of Limitations, time begins to run in favour of the company from the moment when it refuses to treat the plaintiff as the owner of the shares (d). The above statements apply to cases where shares are standing in the joint names of several persons, one of whom forges the names of the others (e), and to shares standing in the name of a corporation whose clerk improperly puts its seal to a transfer (f).

Again, a company (g) is liable to an action for damages at the instance of a person who has bought or sold shares or

False certificates.

Bank v. River Plate Bank, 20 Q. B. D. 232, and on appeal 21 Q. B. D. 535, ante, p. 660, note (y).

(a) See the cases in the next notes, and *Ashby v. Blackwell*, 2 Eden, 299, and 1 Amb. 503. *Hilyard v. The South Sea Co.*, 2 P. W. 76, cannot be relied upon; see the case last cited, and *Bank of Ireland v. Evans's Charity Trustees*, 5 H. L. C. 389; *Orr v. Union Bank of Scotland*, 1 McQueen, 513.

(b) See the cases in the next notes, and *Barnett, Hoares & Co. v. South London Tramway Co.*, 18 Q. B. D. 815; *Johnston v. Renton*, 9 Eq. 181; *Cottam v. Eastern Counties Rail. Co.*, 1 J. & H. 243; *Marsh v. Keating*, 2 Cl. & Fin. 250, which shows that the forgery is no bar to civil proceedings for damages sustained by

the transfer.

(c) *Barton v. L. and N.-W. Rail. Co.*, 24 Q. B. D. 77; *Barton v. L. and N.-W. Rail. Co.*, 38 Ch. D. 144; *Carshore v. North-Eastern Rail. Co.*, 29 Ch. D. 344. See, as to interpleader, *Dalton v. Midland Rail. Co.*, 12 C. B. 458, and 13 ib. 474.

(d) *Barton v. North Staffordshire Rail. Co.*, 38 Ch. D. 458.

(e) *Barton v. North Staffordshire Rail. Co.*, 39 Ch. D. 458, and *Barton v. L. and N.-W. Rail. Co.*, 24 Q. B. D. 77, in both of which cases the registered holders were executors.

(f) *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

(g) As to directors, see *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833.

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advanced money on the faith of a certificate of title issued by a company, and who has been damnified thereby (h), although the company may have been induced to issue the certificate by fraud or forgery (i). The company will not, however, be liable to the person to whom the certificate was issued, if it was issued on a forged transfer lodged by him (j).

Shaw v. Port Philip Gold Mining Company.

In *Shaw v. Port Philip Gold Mining Co.* (k) it was the duty of the secretary of the company to issue certificates under the seal of the company to persons entitled to them; but by the regulations of the directors the certificates required the signatures of a director, the secretary, and the accountant. The secretary improperly affixed the seal of the company to a certificate in favour of a purchaser from himself, and forged the signature of one of the directors to such certificate. The purchaser acted in good faith and transferred the shares to the plaintiff for value. The company was held bound by the certificate, and liable to the plaintiff for damages (l).

In the case of a purchase the measure of damages is the value of the shares at the time when the company refuses to register the purchaser (m).

Simm v. Anglo-American Telegraph Company.

But the mere fact that a company has registered a forged transfer or issued a certificate which is untrue, will not render

(h) *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188, where the plaintiff had advanced money on the shares, but had been paid off.

(i) *Balkis Consolidated Co. v. Tomkinson* [1893], A. C. 396, when the plaintiff was the vendor. *Ottos Kopje Diamond Mines* [1893], 1 Ch. 618; *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino, &c., Co.*, L. R. 5 Ex. 111; and *Bloomenthal v. Ford* [1897], A. C. 156, where a person advanced money on a certificate falsely stating that the shares were fully paid. Compare *Shropshire Union Rail. Co. v. The Queen*, L. R. 7 H. L. 496, reversing S. C., L. R. 8 Q. B. 420, which turned on the fact that the certificate was true, but only purported to show the legal title.

(j) *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833, distinguished on this ground from *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188, noticed *infra*, p. 669.

(k) 13 Q. B. D. 103, see *ante*, p. 82. Compare *Mayor, &c., of the Staple of England v. Governor of Bank of England*, 21 Q. B. D. 160; and *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714.

(l) *Qu.* whether in this case the secretary was acting for the company so as to bind it by his acts. See *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714, noticed *ante*, p. 267.

(m) *Ottos Kopje Diamond Mines, Ltd.* [1893], 1 Ch. 118.

the company liable in damages to the person wrongly registered as a shareholder or to whom the certificate was issued, unless he has acted (n) or remained inactive (o) on the faith of the validity of the registration, or of the truth of the certificate, and has thereby suffered damage. This is well illustrated by the case of *Simm v. Anglo-American Telegraph Co.* (p). In that case *Burge* bought some stock in the defendant company, and received a transfer which purported to be signed by one *Coates*, who held stock in the company. *Burge* sent this transfer to the company, who registered it after making the usual inquiries, but no certificate was issued. *Burge* then transferred the stock to *Simm*. The company registered this transfer, and issued a certificate to *Simm*, stating that he was the holder of the stock. *Simm*, who was secretary to the National Bank, held the stock as trustee for *Burge*, subject to any lien the bank might have on it for advances to *Burge*. The bank made advances to *Burge* on the stock, but these advances had been repaid before the action was brought. The company having discovered that *Coates's* signature was a forgery, refused to acknowledge *Simm* as a stockholder, or to pay him any dividends. Under these circumstances, *Simm* and *Burge* brought an action against the company for the recovery of the purchase-money of the stock, and the dividends thereon. It was contended on their behalf, first, that the National Bank having advanced money to *Burge* on the faith of the transfer to *Simm*, and of the certificate issued to him, *Simm* as trustee for the bank had as against the company acquired a title to the stock by estoppel, and that this title could not be defeated by any fluctuations of the account between the bank and *Burge*; and secondly, that it was the duty of a company to keep a correct register, and that the defendant company having entered *Simm* on the register, could not afterwards refuse to acknowledge his right to the stock. These views prevailed in the Court of first instance, but the

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(n) *Bulkis Consolidated Co. v. Tomkinson* [1893], A. C. 396; *Bloomenthal v. Ford* [1897], A. C. 156, reversing *Ex parte Bloomenthal* [1896], 2 Ch. 525.

(o) *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833.

(p) 5 Q. B. D. 188. The judgment of the Court of Appeal in this case is particularly instructive.

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Court of Appeal reversed this decision and gave judgment for the company, on the ground as regards *Simm*, that although he as trustee for the National Bank would have had a right to recover damages against the company, if the bank had suffered loss from having advanced money to *Burge* on the faith of the certificate issued to *Simm*, yet that these advances had been repaid, and no loss had been incurred; and as regards *Burge*, that the loss sustained by him had arisen from his having accepted as genuine a forged transfer, and not from any representation made to him by the company. Moreover, *Burge* had himself lodged the forged transfer with the company for registration, and thereby induced the company to register it; he therefore was estopped from saying that the company was not entitled to act on the transfer (*q*).

No estoppel
against person
knowing
the truth.

The company will not be estopped from asserting the truth against a person who knows that the certificate is untrue (*r*), unless perhaps he derives title for value from a purchaser without notice of the untruth (*s*).

Certification
of shares.

A "certification" of shares is not, and has not, the same effect as a certificate; it is a representation that a certificate of the shares as described in the transfer and other documents (if any) necessary to show the vendor's title have been lodged with the company; it is not a representation as to the validity of the documents or the title of the vendor (*t*). Moreover, a certification given by the company's secretary does not estop the company from proving that the documents were not in fact lodged with it (*tt*).

In connection with this subject, it should be remembered

(*q*) See *Balkis Consolidated Co. v. Tomkinson* [1893], A. C. 396, and *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833.

(*r*) *Ex parte Sandys*, 42 Ch. D. 98; *London Celluloid Co.*, 39 Ch. D. 190, and *Wright, J. in Markham and Darter's case* [1899], 1 Ch. 414.

(*s*) Compare *Barrow's case*, 14 Ch. D. 432, and *Ex parte Sandys*, 42 Ch. D. 98, with *London Celluloid Co.*, 39 Ch. D. 190. See, too, *Whitworth's claim* [1901], 1 Ch. 115.

(*t*) *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512.

(*tt*) *George Whitechurch, Ltd. v. Cavanagh*, 17 Times L. R. 746. This case apparently overrules *McKay's case* [1896], 2 Ch. 757, where the shares in the transfer were described as fully paid-up, and the company was held to be estopped from denying this. But observe that in the former case the secretary was a party to the fraud.

that a company cannot be estopped from denying that it has done something which it had no power to do; so that if a person has bought shares or advanced his money on the faith of a certificate, which the company had no power to issue, he cannot recover damages from the company for the loss he has sustained (*u*).

The Forged Transfer Acts, 1891 and 1892 (*x*), empower incorporated companies, incorporated building societies, and certain other incorporated societies to make compensation out of their funds for loss arising from forged transfers of their shares, stocks, or securities, and to provide a fund as therein mentioned, and borrow money for this purpose.

A person, however innocent he may be, who executes a transfer under a forged power of attorney is liable in damages for breach of warranty of authority to the company which acts upon the transfer; the damages may include the costs of an action by the shareholder against the company (*y*).

Estoppel by carelessness.

The most difficult cases which arise in practice are those in which the shareholder, whose shares have been improperly transferred from his name into the name of some one else, has been guilty of some carelessness which has facilitated the improper dealing with his shares. The mere fact that he has signed transfers in blank, and entrusted them with his share certificates to a broker or banker, does not without more estop the transferor from claiming his shares as against a purchaser who knew that the transfer was in blank (*z*). The transferor may, however, be estopped if it be proved that by general usage documents in this form are treated as conferring a good

(*u*) See *ante*, Bk. II. c. 2, § 2, and *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714.

(*x*) See 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36.

(*y*) *Oliver v. Bunk of England* [1901] 1 Ch. 633. A person who has innocently joined in executing

the power of attorney, but does not execute the transfer, is under no liability to the company.

(*z*) See the cases *ante*, pp. 659, note (*r*), and 662, and *Taylor v. Great Indian Peninsula Rail. Co.*, 4 De G. & J. 559, noticed *ante*, p. 656; *Swan v. North British Australian Co.*, 2 H. & C. 175, noticed *infra*.

Bk. III. Chap. 4. title to the shares upon any one into whose hands the documents come (a).
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Again, carelessness in leaving share certificates or transfers about, although it facilitates fraud and even forgery, does not cause it, and does not of itself estop the owner of the shares from recovering them (b). So, carelessness on the part of a corporation as to the custody of its common seal, does not prevent the corporation from recovering shares transferred from its name by an unauthorised and fraudulent use of its seal (c). Nor does the omission by the registered holder of shares to answer a letter from the company stating that a transfer of his shares has been lodged for registration necessarily prevent him from holding the company liable for transferring his shares if the transfer is a forgery (d). If, however, a person lodges with the company for registration a transfer, which, unknown to him, is a forgery, he will be estopped from denying the company's right to act on it (e).

Swan's case.

The leading case on the kind of carelessness which will prevent the person guilty of it from recovering shares wrongfully transferred from his name, is *Swan's case*. The facts there were somewhat like those in *Taylor v. Great Indian Peninsula Railway Co.* (noticed *ante*, p. 656). But in *Swan's case* the transfers had been actually registered, and the vendor sought to have the registration cancelled. The case came first before the Common Pleas (f), and then before the Exchequer (g), and lastly before the Exchequer Chamber (h). All the judges agreed that the transfers were wholly void, and conferred no title on the transferee, although he was a *bonâ fide* purchaser; and it was also held by the Exchequer Chamber

(a) See *Colonial Bank v. Carly*, 15 App. Ca. 267, noticed *ante*, p. 665. The editor is not aware of any decision showing that there is such a usage with reference to the shares of any English companies.

(b) *Johnston v. Renton*, 9 Eq. 181; *Johnstone's claim*, 6 Ch. 212.

(c) *Bank of Ireland v. Evans's Charity Trustees*, 5 H. L. C. 389; *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

(d) *Barton v. L. & N.-W. Rail. Co.*, 24 Q. B. D. 77.

(e) *Dixon v. Kennaway & Co.* [1900], 1 Ch. 833; *Balkis Consolidated Co. v. Tomkinson* [1893], A. C. 396; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188, noticed *ante*, p. 668.

(f) *Ex parte Swan*, 7 C. B. N. S. 400.

(g) *Swan v. North British Australian Co.*, 7 H. & N. 603.

(h) 2 H. & C. 175.

that the vendor was not estopped, by his own negligence in signing the blank transfers, from asserting his title to the shares. On this point the judges in the Courts below had been equally divided (i). Bk. III. Chap. 4.
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In order that carelessness may estop one person from denying his title as against another, it is necessary that the carelessness shall be in the transaction in which that other has been engaged, and shall be the proximate cause of his being misled, and must be the neglect of some duty owing to him or to the public, of whom he is one. But the neglect of what is prudent, having regard to one's own interests or neglect of duty to third persons through whom the person relying on the estoppel does not claim, is not sufficient for the purpose (k).

Similar observations apply to acts done, not by carelessness, but under the influence of fraud or misrepresentation, or of misplaced confidence (l).

SECTION VI.—OF SALES OF SHARES AND QUESTIONS ARISING THEREON.

There is nothing illegal at common law in the sale of shares or scrip (m). At the same time, if a company or projected company is itself illegal, the sale of its shares or scrip is illegal also (n).

(i) See some observations on this case in 11 Eq. 319.

(k) See Lord Blackburn's celebrated judgment in *Swan v. North British Australasian Co.*, 2 H. & C. 175; *Bank of Ireland v. Trustees of Evans' Charity*, 5 H. L. C. 389; *Mayor, &c., of Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160; *Carr v. Lond. and N.-W. Rail. Co.*, L. R. 10 C. P. 307; *Cole v. North-Western Bank*, ib. 354; *Scholfield v. Earl of Londesborough* [1896], A. C. 514; *George Whitechurch, Ltd. v. Cavanagh*, 17 Times L. R. 746; 2 K. B. 697; *Davis v. Bank of England*, 2 Bing. 393, where the careless drawing of a cheque estopped the drawer from

complaining of a forgery, cannot now be relied upon. See as to estoppel apart from carelessness, where an agent exceeds his real authority, *Farquharson Bros. & Co. v. King* [1901], 2 K. B. 697, and cases there cited, and *ante*, p. 328, note (g).

(l) *Johnston v. Renton*, 9 Eq. 181; *Johnstone's claim*, 6 Ch. 212, and see *Donaldson v. Gillot*, 3 Eq. 274.

(m) See *Barclay's case*, 26 Beav. 177; *Aston's case*, 4 De G. & J. 320, and 27 Beav. 474; *Grisewood's case*, 4 De G. & J. 544; *Ex parte Bagge*, 13 Beav. 162.

(n) *Josephs v. Pebrer*, 3 B. & C. 639; *Buck v. Buck*, 1 Camp. 547. The statute of 7 & 8 Vict. c. 110,

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Gaming and
wagering in
shares.

There is nothing illegal in the sale of shares in companies which are being wound up (o).

A *bonâ fide* contract by a person to deliver shares which he has not got, is legal (p). But a contract for their purchase and sale, where neither party intends to accept or deliver them, and they only intend to pay "differences," according to the rise or fall of the market, is void as a gaming or wagering contract within 8 & 9 Vict. c. 109, § 18 (q); and if this is the real nature of the contract it will not be rendered valid by the fact that the parties have the option to demand delivery or acceptance, as the case may be, of the shares (r). Further an agreement, entered into after the transactions have been closed, to transfer shares in payment of the balance due in respect of such differences, is an agreement without consideration; damages cannot be recovered for its breach (s), and *à fortiori* the Courts will not order its specific performance. If securities or monies are deposited by one of the parties with the other as "cover" to secure the payment of such differences, they can be recovered by the depositor before they have been applied or

prohibited the sale of shares in a company governed by it, until after the company had obtained a certificate of complete registration, and even then by any subscriber not registered as a shareholder, § 26; *Ex parte Neilson*, 3 De G. M. & G. 556; *Morris v. Cannan*, 4 De G. F. & J. 581. But the statute is now repealed; and the prohibitions in question never extended to companies, the formation of which was commenced before the 1st Nov. 1844 (as to which see *Baker v. Plaslitt*, 5 C. B. 262; *Aston's case*, 27 Beav. 474, and 4 De G. & J. 320), nor to railway or other companies requiring the authority of Parliament: *Young v. Smith*, 15 M. & W. 121; *Bousfield v. Wilson*, 16 ib. 185; *Lawton v. Hickman*, 9 Q. B. 563.

(o) See *Rudge v. Bowman*, L. R. 3 Q. B. 689, and *infra*, p. 681.

(p) *Hibblewhite v. McMorine*, 5 M. & W. 462; *Barry v. Croskey*, 2 J. & H. 1; *Ex parte Phillips*, and *Ex parte Marnham*, 2 De G. F. & J. 634; *Laughton v. Griffin* [1895], A. C. 104.

(q) *Grisewood v. Blane*, 11 C. B. 539; *Rees v. Fernie*, 4 N. R. 539, and the cases in the last note. The old Stock-jobbing Act (Sir John Barnard's Act), 7 Geo. 2, c. 8, was repealed by 23 & 24 Vict. c. 28. It did not apply to shares in companies. See *Hewitt v. Price*, 4 Man. & Gr. 355; *Williams v. Trye*, 18 Beav. 366. See, too, *Ex parte Turner*, 3 De G. & J. 46, and the cases there cited.

(r) *Universal Stock Exchange, Ltd. v. Strachan* [1896], A. C. 166; *re Gieve* [1899], 1 Q. B. 794.

(s) *Ex parte Waud* [1898], 2 Q. B. 383.

appropriated with his knowledge in payment thereof (t), but not afterwards (u). Formerly a broker who paid such differences for his principal could recover them from him (x), but the law in this respect has been altered by the Gaming Act, 1892; a broker cannot now recover them, unless he did not know when he paid them that they were due in respect of gaming transactions, and unless his principal has estopped himself from setting up the Act as a defence to his claim (y). But these gaming and wagering contracts can seldom be proved; for in the ordinary course of business there is a valid contract to buy and another to sell (z).

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A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares, or a conspiracy by fraudulent means to raise or lower the price of shares with intent to defraud buyers or sellers, is an indictable offence (a), and no action can be maintained in respect of any agreement entered into for the purpose of carrying out the conspiracy by any party to it (b).

By the rules of the London Stock Exchange, bargains in the shares of a new company are contingent on the appointment of a settling day; but the validity of contracts in relation to such shares is not affected by reason of the appointment having been

(t) *Universal Stock Exchange, Ltd. v. Strachan* [1896], A. C. 166; *Ex parte Waud* [1898], 2 Q. B. 383.

Thomas [1895], 1 Q. B. 698; *Burge v. Ashley and Smith* [1900], 1 Q. B. 754.

(u) *Strachan v. Universal Stock Exchange, Ltd.* (No. 2) [1895], 2 Q. B. 697.

(z) See *Forget v. Ostigny* [1895], A. C. 318, and *Thacker v. Hardy*, 4 Q. B. D. 685, the leading case on this subject, and *infra*, pp. 688 *et seq.*

(x) *Rosewarne v. Billing*, 15 C. B. N. S. 316; *Thacker v. Hardy*, 4 Q. B. D. 685; *Ex parte Rogers*, 15 Ch. D. 207. See, also, *Read v. Anderson*, 13 Q. B. D. 779.

(a) See *Scott v. Brown, Doering & Co.* [1892], 2 Q. B. 724; *R. v. Aspinall*, 1 Q. B. D. 730, and 2 ib. 48; *R. v. De Berenger*, 3 M. & S. 67; *R. v. Esdaile*, 1 Fos. & Fin. 213.

(y) 55 & 56 Vict. c. 9, *Tatam v. Reeve* [1893], 1 Q. B. 44; and *Carney v. Plimmer* [1897], 1 Q. B. 635, a case of money lent to make a deposit with a stakeholder; see, too, *Saffery v. Mayer* [1901], 1 K. B. 11. Monies in the hands of a stakeholder can still be recovered from him before they have been paid over. *O'Sullivan v.*

(b) *Scott v. Brown, Doering & Co.* [1892], 2 Q. B. 724, where the Court of its own accord declined to interfere on this ground, though neither party raised the question of illegality.

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Sect. 6.

Banking
Companies.

By 80 Vict. c. 29, § 1, known as Leeman's Act, it is enacted that all contracts made after the 1st of July, 1867, for the sale or transfer of any shares, stock, or interest in any joint-stock banking company in England or Ireland, constituted under or regulated by any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any written instrument, shall be void unless such contract sets forth in writing the distinguishing numbers of such shares, stock, or interest on the register, or if there is no register, the person in whose name such shares, stock, or interest shall at the time of making such contract stand in the books of the company. The object of this enactment is to prevent runs on banks which may be occasioned by a fall in the price of their shares resulting from gambling transactions (d). It is the custom on the Stock Exchanges of London and Bristol to disregard the provisions of this Act: but such custom is illegal. Contracts in violation of the statute are, however, simply void, not illegal. Consequently, a stockbroker employed to sell shares in a joint stock bank, is liable in damages to his employer if the sale goes off owing to his having disregarded the provisions of the Act (e). Again, a stockbroker employed to purchase such shares has no claim against his principal who refuses to take them, although the broker may have been himself obliged by the rules to pay for the shares (f). But it is otherwise if the principal knew of the custom, and authorised the contract (g); and a person who has, by accepting a transfer in pursuance of the contract, become owner of the shares, may be compelled to indemnify the vendor against all liability in respect of them (h).

(c) *Ex parte Ward*, 20 Ch. D. 356.

(d) See, as to numbering shares, *ante*, p. 67; and see on this Act in addition to the cases below, *Mitchell v. City of Glasgow Bank*, 4 App. Ca. 624.

(e) *Neilson v. James*, 9 Q. B. D. 546.

(f) *Perry v. Barnett*, 15 Q. B. D. 388, and 14 ib. 467.

(g) *Seymour v. Bridge*, 14 Q. B. D. 460. See, also, *Read v. Anderson*, 13 ib. 779, and 10 ib. 100.

(h) *Loring v. Davis*, 32 Ch. D. 625. See, too, *Hardoon v. Belilus* [1901], A. C. 118.

Neither scrip nor shares are goods or chattels or interests in land within the Statute of Frauds; and (subject to the qualification introduced by the Act just noticed) a contract for the sale of them is therefore valid, although not reduced into writing and signed by either buyer or seller, or by any agent of either of them (i). At the same time, if a contract for the sale of shares is reduced into writing, that writing is the proper evidence of the contract, and must therefore be produced properly stamped (k). Moreover, by the Stamp Act, 1891 (54 & 55 Vict. c. 39), any person who effects any sale or purchase of any stock or marketable security of the value of 5*l.* or upwards as broker or agent, is bound under penalty to make and execute a contract note (§ 53), and such note must be properly stamped with a duty of 1*d.* if the shares are of the value of 5*l.* and under 100*l.*, and of 6*d.* if the shares are of the value of 100*l.* or upwards (§ 52). The omission to make a contract note does not prevent the broker from recovering his commission from his principal (l).

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Agreements for
sale of shares.

Contract note.

Under a contract for the sale of shares which is silent as to dividends, the price covers all future dividends, and the purchaser becomes entitled to all dividends declared after the contract is made, though they may be declared before the time fixed by the contract for completion has arrived in respect of a period antecedent to the contract (m).

Dividends on
sales.

As regards delivery, it is to be observed that shares and certificates are different things; and an agreement to deliver shares is performed by the execution and delivery of a proper transfer. Actual delivery of the share certificates is not essential to the performance of such a contract (n). The transferee can generally procure himself to be registered, or to be otherwise recognised by the company as a shareholder without them, although he cannot do so without trouble and

Delivery of the
shares.

(i) *Ante*, p. 632.

(k) *Knight v. Barber*, 16 M. & W. 66, and *ante*, pp. 632 and 651.

(l) *Learoyd v. Bracken* [1894], 1 Q. B. 114, a decision on the corresponding sections of the earlier Act, 51 & 52 Vict. c. 8, § 17. If there

is a contract note, but it is not duly stamped, see 54 & 55 Vict. c. 39, § 53 (3).

(m) *Black v. Homersham*, 4 Ex. D. 24.

(n) *Hunt v. Gunn*, 13 C. B. N. S. 226, and 3 Fos. & Fin. 223.

Bk. III. Chap. 4. Sect. 6. delay (o). In practice the vendor's share certificates are usually handed to the purchaser with the transfer or are sent to the company to enable the transfer to be carried out (oo); and if the vendor does not send his certificates within a reasonable time, the purchaser may decline to accept the shares (p).

1. Sales not on Stock Exchange.

Sales of shares
not on the Stock
Exchange.

A contract for the sale of shares, although usually made through members of the Stock Exchange, may be made without their intervention.

Vendor's
obligations.

A simple contract for the sale of shares imposes on the vendor the obligation of delivering to the purchaser on the day fixed, or if no time be fixed within a reasonable time after the date of the contract (q), the number of shares agreed to be sold. But, except in cases to which 30 Vict. c. 29 is applicable (r), or unless there be some special stipulation to that effect, the vendor is not bound to deliver any particular shares; nor is it important whether when he agreed to sell he actually had any shares or not (s); it is sufficient if he procures them in time. Neither is it necessary that the shares should be actually vested in him, or that he should be the actual transferor; it being immaterial to the purchaser by whom the transfer to him is made, provided only the transferor's title is good (t).

Duty to procure
transfer.

It has been said that it is the vendor's duty to procure the registration of the shares in the name of the purchaser (u). But this is going too far; and it appears more correct to say that in the absence of express agreement (x), the purchaser takes the risk of any objection being made by the company to

(o) See *Société Générale de Paris v. Walker*, 11 App. Ca. 34, ante, p. 663, as to the effect of not getting the certificates.

(oo) See *infra*, p. 690.

(p) *De Waal v. Adler*, 12 App. Ca. 141. The constitution of the company does not appear, and shares and certificates were apparently treated as the same things.

(q) *De Waal v. Adler*, 12 App.

Ca. 141.

(r) *Ante*, p. 676.

(s) *Ante*, p. 674, note (p).

(t) See the judgment of Lord Blackburn in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(u) *Wilkinson v. Lloyd*, 7 Q. B. 27; *Lloyd v. Criepe*, 5 Taunt. 249. See, also, *Birmingham v. Sheridan*, 33 Beav. 660.

(x) See *per* Lord Campbell in *Stray v. Russell*, 1 E. & E. 900.

himself as the transferee; and also the risk of all other objections not based on the right of the transferor to transfer his shares (y). The vendor, however, must do whatever is necessary to perfect his right to transfer, *e.g.*, pay all calls which become due before the purchaser becomes in equity the owner of the shares (z).

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With respect to the title which a vendor of shares can be required to show, the distinction between incorporated and unincorporated companies is of great importance. A vendor of a share in an incorporated company has only to show a title to the shares he proposes to transfer; and he cannot be required to show any title in the company to its landed property or other assets (a). But the title of a vendor of a share in an unincorporated company is not so clearly separable from the title of the company; and a vendor who sells a share in such a company without special conditions runs the serious risk of finding himself embarrassed by requisitions respecting the title of the company to its landed property (b).

Vendor's title.

The cases referred to below are quite sufficient to render it prudent for a vendor of shares in an unincorporated company to stipulate that he shall not be required to adduce any evidence of the title of the company to any property whatever; and for a vendor of shares in any company to stipulate that he shall not be required to adduce any evidence of his own title, except the registry of himself as a shareholder in respect of the shares offered for sale (c).

The obligation of the purchaser is to pay the price agreed upon, and to accept a transfer of the shares, and to indemnify

Purchaser's obligations.

(y) See *London Founders' Association v. Clarke*, 20 Q. B. D. 576; *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882; *Stray v. Russell*, 1 E. & E. 888, and Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132; and the cases *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Sheppard v. Murphy*, Ir. R. 2 Eq. 544, which, however, are all Stock Exchange cases.

registration, see 30 & 31 Vict. c. 131, § 26, *ante*, p. 652.

(a) See *Shaw v. Fisher*, 2 De G. & Sm. 11, and 5 De G. M. & G. 596, as to the title which can be required in these cases.

(b) See *Curling v. Flight*, 6 Ha. 41, and 2 Ph. 613; *Stevens v. Guppy*, 3 Russ. 171; *Morris v. Kearsley*, 2 Y. & C. Ex. 139.

(c) See *Hare v. Waring*, 3 M. & W. 362, as to evidence of title by entries in a company's books.

(z) As to his right to procure

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the vendor from all liability in respect of them accruing after the purchaser has become their equitable owner (*d*). It has long been established that a contract for the sale and purchase of shares is one of which specific performance will be enforced (*d*); whence it follows that from the time when his contract ought to have been performed, the purchaser becomes in equity the owner of the shares; and all the rights and obligations incidental to such ownership attach to him (*e*). Moreover, this relation of trustee and *cestui que trust* may be created, not only by a direct contract between the parties, but in other ways—*e.g.*, if there is a series of assignments by equitable owners, the ultimate assignee will be the *cestui que trust* of the legal owner, and be bound to indemnify him accordingly (*f*). Numerous authorities illustrate these principles; but as they relate to purchases and sales through brokers, they will be noticed hereafter (*g*).

The obligation of a purchaser to pay the price, accept the shares, and indemnify the vendor against liability in respect of them, was recognised at law even before the Judicature Acts; and for a breach of such an obligation an action will lie (*h*). Moreover, this obligation exists and will be enforced, notwithstanding the shares may have become valueless since the date of the contract by reason of the stoppage of the company or otherwise (*i*), and notwithstanding they cannot be registered in the name of the purchaser (*i*). The risk is on

(*d*) *Cheale v. Kenward*, 3 De G. & J. 27; *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 2 De G. & S. 11, and 5 De G. M. & G. 596. Fry on Specific Performance, pp. 34 & 655 *et seq.*, 3rd ed.

(*e*) *Loring v. Davis*, 32 Ch. D. 625. As to dividends declared before this time, see *Bluck v. Homersham*, 4 Ex. D. 24, *ante*, p. 677.

(*f*) A trustee's right to indemnity does not depend upon contract, *Hardoon v. Belilios* [1901], A. C. 118.

(*g*) See *inter alia*, *Shepherd v. Gillespie*, 3 Ch. 764, and 5 Eq. 293; *Evans v. Wood*, 5 Eq. 9; *Paine v. Hutchinson*, 3 Eq. 257, affirmed 3

Ch. 388, where forms of decree are given.

(*h*) See *Kellock v. Enthoven*, L. R. 9 Q. B. 241; affirming S. C. 8 Q. B. 458, where the vendor was made a contributory as a past member; *Walker v. Bartlett*, 18 C. B. 845, and *Humble v. Langston*, 7 M. & W. 517.

(*i*) See, at law, *inter alia*, *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; and in equity, *inter alia*, *Paine v. Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Hawkins v. Maltby*, 6 Eq. 505, and

the purchaser, and as he benefits by a rise in the value of the shares, so he suffers if they become worthless or worse. But the terms of the agreement may throw the risk on the vendor (*k*).

Further, a contract for the sale of shares in a company being wound up under the Act of 1862 is perfectly valid, although made during the liquidation of the company. The provisions of the Companies Act, 1862, §§ 131—153, declaring certain transfers made after the commencement of the winding up to be void, operate only to prevent the register of shareholders or the list of contributories from being altered by reason of such transfer (*l*); and such a contract is binding upon a purchaser, although he can show that he was ignorant of the fact of the company having gone into liquidation (*m*).

On the other hand, a contract for the sale and purchase of shares does not bind the purchaser to accept what does not answer the description of the shares which he agreed to buy. If, therefore, such shares do not exist, he is not compellable to pay the price agreed upon; and if he has paid it in ignorance of the facts, he can recover it back as money paid for a consideration which has failed (*n*).

In *Kempson v. Saunders* (*o*) it was held that a purchaser of shares in a projected company which was never formed, was entitled to recover back his money from the vendor, although the vendor was not an original subscriber, and had himself purchased the shares from other persons.

4 Ch. 200; *Loring v. Davis*, 32 Ch. D. 625, which, however, were all cases in which the defendant had accepted the transfers. Compare *Birmingham v. Sheridan*, 33 Beav. 660, which, however, cannot now be relied on, as was admitted by the M. R. in *Fenwick v. Wood*, 6 June, 1870, and see 3 Ch. 393.

(*k*) See *per* Lord Campbell in *Stray v. Russell*, 1 E. & E. p. 900; and *Wilkinson v. Lloyd*, 7 Q. B. 27. Fry, Sp. Per. p. 667, 3rd ed.

(*l*) *Biederman v. Stone*, L. R. 2 C. P. 504; *Rudge v. Bowman*, L. R. 3 Q. B. 689; *Onward Building Society* [1891], 2 Q. B. 463. See *ante*, p. 653.

(*m*) *Rudge v. Bowman*, L. R. 3 Q. B. 689, 697. See, as to enforcing such a contract in equity, *Emmerson's case*, 1 Ch. 433, explained by Wood, L. J., in *Paine v. Hutchinson*, 3 Ch. 388, 391. Fry, Sp. Per. 669, 3rd ed.

(*n*) *Watkins v. Huntley*, 2 Car. & P. 410, note; *Westropp v. Solomon*, 8 C. B. 345.

(*o*) 4 Bing. 5. Compare *Stent v. Bailis*, 2 P. W. 217; *Mitchell v. Newhall*, 15 M. & W. 308.

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Sales of shares
in companies
being wound up.

Position of parties where the shares bought and sold are not identical.

Kempson v. Saunders.

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Ex parte Pan-
mure.

Again, an authority to obtain shares from company A. is not pursued by obtaining shares from company B., and if they are obtained by mistake or otherwise the principal is not bound to take them, and can repudiate them if they are registered in his name (*p*). In such a case the agent is liable to company B. for the damages that company may have sustained by losing the allottee as a shareholder (*q*).

Again, where shares are apparently bought, and the certificates for them prove to be forged, the purchaser can recover their price from the vendor (*r*).

Preparation of
transfer.

Strictly speaking, it is the purchaser's duty to prepare the transfer, and to tender it to the transferor for execution (*s*); but the form of transfer is so simple that in practice the vendor fills it up and sends it to the purchaser to execute.

The effect of a transfer in blank (*t*), and also the question whose duty it is to procure it to be registered (*u*) have been already considered.

Transfer to
purchaser's
nominee.

An important question connected with the transfer is, whether the vendor is bound to transfer to any person nominated by the purchaser, or can insist on transferring to the purchaser himself (*x*). As will be seen hereafter, a purchaser of shares sold on the Stock Exchange is entitled to require a transfer to himself or his nominee (*y*). Lord Blackburn has stated his opinion to be that any other purchaser has the same right (*z*). But it must be borne in mind that a transfer does not always relieve a transferor from all liability (*a*),

(*p*) *Ex parte Panmure*, 24 Ch. D. 367; and see *Baillie's case* [1898], 1 Ch. 110.

(*q*) *Ex parte Panmure*, 24 Ch. D. 367, where the damages were the whole amount of the shares.

(*r*) *Royal Exchange Assur. Co. v. Moore*, 2 N. R. 63, Q. B., a case of forged debentures.

(*s*) *Humble v. Langston*, 7 M. & W. 517, and *per* Lord Blackburn, in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*t*) *Ante*, pp. 654 *et seq.*

(*u*) *Ante*, p. 678.

(*x*) If shares are mortgaged or

charged, or a lien is conferred by the articles of association, § 15 of the Conveyancing and Law of Property Act, 1881, applies, and the shareholder can, on payment, require the mortgagee to assign to his nominee. *Everitt v. Automatic Weighing Machine Co.* [1892], 3 Ch. 506.

(*y*) *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*z*) See his judgment in the case last cited.

(*a*) *E.g.*, in companies formed and registered under the Companies Act, 1862, from liability as a past member.

and that it is often a matter of great importance to a transferor that his transferee shall be a person of substance. Whatever, therefore, the rule may be in cases where the transferor is under no liability, or where by his transfer he frees himself from all liability, it is very questionable whether a vendor of shares who has not agreed expressly or impliedly (by selling on the Stock Exchange) to transfer to the nominee of the person with whom he has contracted, is under any obligation to transfer to such nominee (b). A vendor of a leasehold estate who has himself entered into onerous covenants, is surely not under any obligation to assign to a pauper at the request of the purchaser, unless indeed the purchaser enters into a covenant for indemnity which would obviously remove the vendor's objections.

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It is conceived that an unpaid vendor of a share in a company has the same right of stopping the delivery to an insolvent purchaser that a seller of ordinary goods has in similar cases.

Lien of vendor
for unpaid purchase-money.

A person who fraudulently sells shares in a company which he knows has no existence, is criminally responsible (c). But the rule *caveat emptor* renders it lawful for a person holding shares in an insolvent company to sell them to any one willing to buy them; and in the absence of misrepresentation by the seller, the buyer is apparently without remedy against him (d).

Fraudulent sale.

A person who has been induced to purchase shares by fraud on the part of the seller, can, at his option, either keep the shares and sue for the damage he has sustained by the fraud, or repudiate the contract, and recover the money paid under it. But he cannot adopt the latter alternative unless he can, when the action is brought, restore the shares in the same state in which he took them, and place the seller in the same position in which he stood before the sale (e). The

Fraud by the
seller.

(b) *Coles v. Bristowe*, 4 Ch. 3, is an authority to the effect that he is not.

888, and *ante*, p. 680.

(c) See *Maccallum v. Turton*, 2 Y. & J. 183.

(e) *Clarke v. Dickson*, E. B. & E. 148; and see *Maturin v. Tredinnick*, cited in the next note. As to actions for damages sustained by taking shares on the faith of fraudulent statements, see *Clarke v.*

(d) See *Remfry v. Butler*, E. B. & E. 887; *Stray v. Russell*, 1 E. & E.

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purchaser can also maintain an action to rescind the contract, and to compel the vendor to indemnify him. And the fact that the plaintiff sold some of the shares before he knew of the fraud, will not disentitle him to relief, if the contract is severable, and this it has been held to be, where all the shares bought are shares in the same company (*f*). Nor will the forfeiture of the shares after the commencement of the action affect his rights (*g*). Unless, however, the company is implicated in the fraud, the purchaser, if he has become a shareholder, cannot, it is conceived, prevent calls being made upon him (*h*).

Fraud on seller.

If a person is induced to sell shares by the fraud of the purchaser, the vendor has similar rights to those which a purchaser has in the converse case already considered. But where the purchaser is innocent of the fraud, and a person's shares have been fraudulently sold and transferred by others, his rights against the purchaser will depend upon whether the latter has acquired the legal ownership or the right to call for the legal ownership, *bonâ fide*, for value, and without notice of the fraud. If he has, his title cannot be impeached (*i*); but if he has not, the shares may be recovered from him, unless the claimant has lost his right to relief by his own negligence, lapse of time, or some other special circumstance (*k*).

Effect of fraud
on title of pur-
chaser.

Sales of shares
by auction.

Shares are not unfrequently sold by auction. If an auctioneer sells shares, without disclosing the persons on whose behalf he sells, he will be personally responsible for the due completion of the sale, and will be liable to the purchaser in damages for the non-transfer of the shares to him (*l*). Moreover, if in such a case the auctioneer, when called upon to

Dickson, 6 C. B. N. S. 453; *Bedford v. Bagshaw*, 4 H. & N. 538; *Davidson v. Tulloch*, 3 Macqueen, 783; *Twycross v. Grant*, 2 C. P. D. 469, and *ante*, pp. 92 *et seq.*

(*f*) *Maturin v. Tredinnick*, 2 N. R. 514, and 4 ib. 15.

(*g*) *Ibid.*

(*h*) See *ante*, pp. 91 and 260 *et seq.*, and *infra*, Bk. IV. c. 1, § 13, A. 4. *Bloxam v. Metropolitan Cab Co.*, 4 N. R. 51, V.-C. W.,

where an injunction was granted is, it is conceived, not opposed to this, as the plaintiff was not a shareholder.

(*i*) See *ante*, pp. 658 *et seq.*

(*k*) See *Taylor v. Great Indian Rail. Co.*, 4 De G. & J. 559, *ante*, p. 656, and other cases of forged transfers cited *ante*, pp. 667 *et seq.*

(*l*) *Franklyn v. Lamond*, 4 C. B. 637.

transfer the shares, refers the purchaser to the owners, it becomes unnecessary for the purchaser to tender a deed of transfer to the auctioneer before suing him, for by such a reference the auctioneer discharges the purchaser from tendering any deed of transfer to him (*m*). If shares are sold subject to a condition that if they are not paid for by a certain time, the seller shall be at liberty to resell them, and shall be entitled to recover from the purchaser any loss sustained by the resale, and the shares are sold and resold under this condition, the first purchaser can be sued on the special contract entered into by him (*n*).

In an action by a purchaser of shares against a seller, for not transferring the shares bought, the purchaser must prove —1, that he was ready and willing to pay for the shares (*o*), and 2, that he tendered to the seller for his execution a proper instrument of transfer (*p*). The necessity for such tender, however, only exists upon the supposition that some formal document is required to render the transfer of the shares complete, and upon the further supposition that the seller has not discharged the purchaser from making the tender (*q*).

Again, a seller suing a purchaser for not accepting shares must prove readiness and willingness on his, the seller's part, to transfer those shares to the purchaser (*r*). The circumstances that a call is due upon shares agreed to be sold, and that they are not transferable so long as the call remains unpaid, do not disprove readiness and willingness on the part of the seller to transfer, if he was in fact ready and able to pay the call in question (*s*).

The effect of transfers in blank has been already considered (*t*). The decisions at law on this subject must now

(*m*) *Franklyn v. Lamond*, 4 C. B. 284; *Green v. Murray*, 6 Jur. 728, 637. Q. B.

(*n*) *Lamond v. Davall*, 9 Q. B. 1030. (*q*) *Franklyn v. Lamond*, 4 C. B. 637.

(*o*) *Lawrence v. Knowles*, 5 Bing. N. C. 399. In *Tempest v. Kilner*, 2 C. B. 300, the averment of readiness and willingness was traversed too largely. (*r*) *Hannuic v. Goldner*, 11 M. & W. 849. As to the duty to procure a transfer, see *ante*, p. 678, and *infra*, p. 696.

(*p*) *Stephens v. De Medina*, 4 Q. B. 422; *Bowlby v. Bell*, 3 C. B. 810. (*s*) *Shaw v. Rowley*, 16 M. & W. 810.

(*t*) *Ante*, pp. 654 *et seq.*

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Actions by purchaser against seller.

Actions by seller against purchaser.

Transfers in blank.

Bk. III. Chap. 4. be taken with the qualifications rendered necessary by the
Sect. 6. decisions in equity.

Damages recoverable when contract for sale is broken.

In an action by the seller of shares against the purchaser for not accepting them, the damages are measured by the difference between the contract price and the market price at the time of the purchaser's breach of contract (*u*); and it is for the jury to determine when this time was (*x*). So, in an action by the purchaser of shares against the seller for not delivering them, the damages are measured by the difference between the contract price and the market price at the time when they ought to have been delivered (*y*). Where, however, an action is brought for not re-delivering shares lent and agreed to be returned on a given day, the damages are measured by the market price of the shares at the time of the trial (*z*); and the same rule is adopted in estimating damages in actions against companies for not delivering shares at the time they ought (*a*). But if the plaintiff shows that the shares have fluctuated in value during the interval between the time they ought to have been delivered and the time of trial, or, if they have been delivered, the time of delivery, and that he intended to sell the shares, these circumstances may be taken into consideration in estimating the damages (*b*).

Specific performance of contract of sale.

An action will lie for specific performance of a contract for the purchase and sale of shares (*c*) if it is capable of being performed (*d*): and the purchaser will be compelled to pay the price, although it may have been expressed to be paid in the

(*u*) *Shaw v. Holland*, 15 M. & W. 136; *Stewart v. Cauty*, 8 M. & W. 160; *Pott v. Flather*, 5 Ra. Ca. 85.

(*x*) *Ibid.*, and see *Barned v. Hamilton*, 2 Ra. Ca. 624.

(*y*) *Tempest v. Kilner*, 3 C. B. 253.

(*z*) *Owen v. Routh*, 14 C. B. 327.

If the shares have been returned, the damages must be limited to the loss caused by their detention. *Williams v. Archer*, 5 C. B. 318.

(*a*) *Cockerell v. Van Diemen's Land Co.*, 18 C. B. 454, and 1 C. B. N. S. 732.

(*b*) See *Williams v. Archer*, 5 C. B. 318; *Williams v. Peel River*,

&c., Co., 55 L. T. N. S. 689; *Mansell v. British Linen Company Bank* [1892], 3 Ch. 159. See, too, *Michael v. Hart & Co.* [1901], 2 K. B. 867, and *Little v. London Joint Stock Bank* [1891], 1 Ch. p. 284.

(*c*) *Ante*, p. 680.

(*d*) See, as to this, *Birmingham v. Sheridan*, 33 Beav. 660, and compare *Poole v. Middleton*, 29 Beav. 646; and see *ante*, p. 680, from which it appears, that although registration in the purchaser's name may be impossible, he can be compelled in equity to indemnify the vendor.

deed of transfer, if, in fact, it was not thus paid (e); and will be compelled to accept a transfer of the shares he has bought, and to indemnify the seller from all liabilities accruing subsequently to the sale (f); and the seller will be compelled to account for any monies he may have received from an improper subsequent sale to another person (g). The Court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them (h); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (i); and to compel the promoters of a company to deliver shares to a subscriber to the company (k). Neither will the Court interfere to compel the completion of a gratuitous and intended transfer (l).

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In *Poole v. Middleton* (m), a purchaser of shares obtained a decree against the seller for the specific performance of the contract of sale, although the directors refused to allow the defendant to transfer his shares. The contract was valid without their consent; and they could not prevent the defendant from completing it, nor object to that mode of transfer which they were in the habit of allowing in other cases.

Relief where
directors refuse
to allow a
transfer.

How far disputes between the vendor and purchaser of shares may be determined by means of the summary jurisdiction conferred by § 35 of the Companies Act, 1862, has been often discussed, but is not yet satisfactorily settled. The jurisdiction apparently exists, but it is discretionary only, and the

Jurisdiction
under § 35 of
the Companies
Act, 1862.

(e) *Wilson v. Keating*, 27 Beav. 121, and 4 De G. & J. 588. The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that he had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed.

(f) *Wynne v. Price*, 3 De G. & S. 310, and other cases cited, *ante*, p. 680. As to the right of a mortgagee of shares to an indemnity from his mortgagor, see *Phene v.*

Gillan, 5 Ha. 1.

(g) *Beckett v. Bilbrough*, 8 Ha. 188.

(h) *Jackson v. Cocker*, 4 Beav. 59. Compare this with the last case.

(i) *Sheffield, &c., Gas Co. v. Harrison*, 17 Beav. 294.

(k) *Columbine v. Chichester*, 2 Ph. 27. In this case, however, the promoters did not appear to have any shares which they could allot.

(l) See *Milroy v. Lord*, 4 De G. F. & J. 264.

(m) 29 Beav. 646.

Bk. III. Chap. 4. decisions seem to show that the Court will be slow to exercise
 Sect. 6. -- the jurisdiction except where the legal title of the applicant
 is clear (n).

2. Sales on the Stock Exchange.

Sales of shares
 on the Stock
 Exchange.

Having now alluded to contracts for the sale of shares otherwise than on the Stock Exchange, it is proposed to notice the effect of entering into such contracts through members of that body. In practice scrip and shares are usually bought and sold through jobbers and brokers (o); and a person employing a broker to buy or sell is, in the absence of evidence to the contrary, presumed to authorise him to buy or sell according to the rules and usages prevailing in the market where the commodity is to be bought or sold (p); and persons employing members of the Stock Exchange as their brokers are bound by the rules and usages which govern that body (q); provided they are not unreasonable, or on some other ground illegal, *e.g.*, contrary to 30 Vict. c. 29 (r). What these rules and usages are is a question of fact to be proved by the person who relies on them: and in considering the cases it is important to bear in mind that the decisions are made only with reference to the custom as proved or admitted in the particular case under

(n) See *Ward and Henry's case*, 2 Ch. 431; *Musgrave and Hart's case*, 5 Eq. 193; *Ex parte Sargent*, 17 Eq. 273; *Ex parte Shaw*, 2 Q. B. D. 463, and see Fry, *Specific Performance*, p. 517, 3rd ed.

Brokers and
 jobbers.

(o) Brokers buy and sell for principals, jobbers for themselves; but as between all members of the Stock Exchange brokers are always regarded as principals; and for the purposes of the text there is no material distinction between brokers and jobbers. That their liabilities on these contracts are alike, see Lord Blackburn's judgment in *Masted v. Paine*, No. 2, L. R. 6 Ex. 132. See, as to brokers, Partn. p. 105, and *Baring v. Corrie*, 2 B. & A. 137. In this case it is said

brokers have no business to contract as principals; but this has no application to sharebrokers, as is evident from the cases alluded to in the text.

(p) See *Fleet v. Murton*, L. R. 7 Q. B. 126; *Robinson v. Mollett*, L. R. 7 H. L. 802, reversing L. R. 5 C. P. 646, and L. R. 7 C. P. 84, and the cases there referred to.

(q) *Forget v. Barter* [1900], A. C. 467; *Stray v. Russell*, 1 E. & E. 888; *Biederman v. Stone*, L. R. 2 C. P. 504; *Griessell v. Bristowe*, L. R. 4 C. P. 36; *Coles v. Bristowe*, 4 Ch. 3; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Duncan v. Hill*, L. R. 6 Ex. 255, reversed in part, L. R. 8 Ex. 242.

(r) *Ante*, p. 489.

consideration, and do not conclude the question as to what the custom really is (s). Bk. III. Chap. 4.
Sect. 6.

Besides the printed rules of the Stock Exchange there are certain established practices observed by its members, and which are as binding upon them as the printed rules themselves. Both the rules and unwritten practices are altered from time to time, but a contract must be interpreted according to the custom as it existed at the date of the contract (t).

The rules and practices of the Stock Exchange respecting the sale and purchase of shares will be found stated in *Maxted v. Paine* (u), *Bowring v. Shepherd* (x), *Grissell v. Bristowe* (y), *Coles v. Bristowe* (z), *Rennie v. Morris* (a), *Merry v. Nickalls* (b), *Thacker v. Hardy* (c), *Bishop v. Balkis Consolidated Co.* (d), and *Ellis v. Pond* (e); and from those cases it appears that in the ordinary course of business a sale of shares on the Stock Exchange is essentially a transaction of the following description:—

1. There is a contract between the selling and buying broker or jobber, to the effect that on a given day, called the account day, the shares shall be deliverable and the price payable.

2. That on the day before the account day (called the name day) the buying broker or jobber gives or passes to the selling broker a ticket containing the name of the person to whom the shares are to be transferred, and the price which that person has agreed to pay for them.

3. That the name so passed can be objected to within a limited time (10 days); and if objected to on reasonable grounds, must be replaced by another name; the committee

(s) Compare *Levitt v. Hamblet* [1901], 2 K. B. 53, with *Anderson v. Beard* [1900], 2 Q. B. 260; and *Beckhouson and Gibbs v. Hamblet* [1900], 2 Q. B. 18, affirmed [1901], 2 K. B. 73, with *Scott and Horton v. Godfrey* [1901], 2 K. B. 726.

(t) Per Lord Blackburn, *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132, 160.

(u) L. R. 4 Ex. 203, and 6 Ex. 132.

(x) L. R. 6 Q. B. 309.

L.C.

(y) L. R. 4 C. P. 36, and 3 C. P. 112.

(z) 4 Ch. 3, and 6 Eq. 149.

(a) 13 Eq. 203, overruled by *Merry v. Nickalls*.

(b) 7 Ch. 733, and L. R. 7 H. L. 533. See, also, *Ex parte Grant*, 13 Ch. D. 667.

(c) 4 Q. B. D. 685.

(d) 25 Q. B. D. 512.

(e) [1898], 1 Q. B. 426. As to "contango" or "continuation," see *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120.

Bk. III. Chap. 4. of the Stock Exchange deciding, in case of dispute, whether
 Sect. 6. another name is to be given or not.

4. That the above-mentioned ticket is prepared by the broker of the ultimate purchaser, and is passed (between 12 and 2 o'clock on the name day) by such broker to his immediate vendor, and by him to his vendor, and so on, until it reaches the broker of the original seller. The ticket is indorsed by each member of the Stock Exchange, with his own name, as it passes through his hands.

5. That the original seller executes a transfer (prepared by his broker) to the ultimate purchaser; the consideration for such transfer being usually stated to be the price agreed to be paid by such purchaser (*f*).

6. That if the seller's share certificate relates solely to the shares sold it usually accompanies the transfer, but that if the certificate relates to more shares than are comprised in the sale it is usually deposited with the company, and the secretary "certificates" the transfer by writing thereon "certificate lodged," and that buyers and their brokers act on the faith of this "certification" as if the certificate had been produced and handed to them (*g*).

7. That the selling broker looks for payment of the price at which he sold to the broker or jobber who bought of him; but usually takes from the broker of the ultimate purchaser the money he has agreed to pay, and then settles for the difference, if any, with the broker or jobber with whom he, the selling broker, originally contracted.

From this statement it is apparent that important and difficult questions of law are likely to arise, and, in order to solve them, it is proposed to consider the position—

1. Of the vendor and of the broker or jobber who agrees to buy from him.

2. Of the vendor and the ultimate purchaser.

(*f*) The confusion introduced by this circumstance led to a variance between the pleadings and the evidence in *Hawkins v. Maltby*, 3 Ch. 188, which, however, was put right in the 2nd suit, 6 Eq. 505, and 4 Ch. 200.

(*g*) *Bishop v. Balkis Consolidated*

Co., 25 Q. B. D. p. 519. Sometimes the certificate is lodged and the transfer "certificated" by an official of the Stock Exchange. As to the effect of certification, see *ante*, p. 670. As to the absence of certificates, see *ante*, pp. 677, 678.

3. Of the vendor and the undisclosed and intermediate purchasers. Bk. III. Chap. .4
Sect. 6.

4. Of the vendor and purchaser as regards their respective brokers.

1. *As to the position of the vendor and of the broker or jobber who agrees to buy from him.*

There is a clear contract between these parties which each can enforce against the other. This has never been doubted; but the real nature of the contract has given rise to much controversy. From the most recent decisions, however, it seems that the true contract is to the effect that the vendor will transfer to the buyer or to his nominee, and that the broker or jobber will either accept the shares and pay for them and indemnify the seller against all liability in respect of them, or find some other person to do so; and that person must be a person *sui juris* who has himself agreed to take the shares, and to whom no reasonable objection can be taken (i). Contract between
vendor and pur-
chasing broker
or jobber.

Accordingly where the name of an infant was passed, and the transfer was made to him, the purchasing jobber was held liable to the vendor, although being ignorant of the infancy he had made no objection to the transferee within the time fixed by the rules of the Stock Exchange (k). So, where a jobber passed the name of a person whose broker had exceeded his authority, by extending the time for completing the sale, and that person declined to accept a transfer, it was held that the jobber had not relieved himself from liability in respect of his contract (l). So, also, where the name passed was that of a foreigner resident at Smyrna, it was held, in substance, that the vendor might reasonably object to it; and having done so, that the jobber remained liable (m). Instances of
jobber's liability.

But if the person whose name is given is *sui juris*, and is one to whom the vendor may reasonably object, and he allows the time for objecting to pass, and executes a transfer to that person, the purchasing broker or jobber is discharged from all Waiver of
objection to
nominee.

(i) See *Muxted v. Paine*, No. 2, ruling *Rennie v. Morris*, 13 Eq. 203. L. R. 6 Ex. 132, and the cases cited in the next few notes. (l) *Muxted v. Paine*, 1st action, L. R. 4 Ex. 81.

(k) *Merry v. Nickalls*, L. R. 7 H. L. 530, and 7 Ch. 733; over- (m) *Allen v. Graves*, L. R. 5 Q. B. 478.

Bk. III. Chap. 4. Sect. 6. further liability, unless, as sometimes happens, he has expressly undertaken some further obligation, *e.g.*, to guarantee registration of the transfer.

Grissell v.
Bristowe.
Coles v.
Bristowe.

In *Grissell v. Bristowe* (n), and *Coles v. Bristowe* (o), the seller had executed a transfer to the person whose name was given as the ultimate purchaser, and he paid for the shares and kept the transfers, but did not execute them, and did not procure them to be registered in his name. The seller consequently remained liable to the company for calls, and he sought to compel the jobber who first bought the shares to indemnify him. But it was held both by the Court of Exchequer Chamber and by the Court of Appeal in Chancery that the jobber had duly discharged his obligations, and had ceased to be liable. In these cases it did not appear that the transferee could have been reasonably objected to; but the decisions showed the true position of purchasing jobbers, and paved the way to those which follow.

Maxted v. Paine,
No. 2.

In *Maxted v. Paine*, No. 2 (p), the name passed was one which could have been reasonably objected to, and was the name of a nominee of the true purchaser, who was paid by him for accepting the transfer. It was, nevertheless, held, that there being no fraud on the part of the defendant (the first purchasing jobber), he had discharged his obligation, by procuring the acceptance of a transfer by a person who could not himself repudiate it, and to whom the vendor had not objected in due time. This case shows conclusively that as between the vendor and purchasing jobber, and where they both act *bonâ fide*, it is the duty of the vendor to make inquiry respecting his proposed transferee.

Registration
guaranteed.

If, as sometimes happens, the purchasing broker or jobber has expressly guaranteed the registration of the shares, he is liable to indemnify the seller against the consequences of their non-registration in the name of the transferee (q); but he is not liable for the solvency of the transferee.

(n) L. R. 4 C. P. 36, reversing
S. C. 3 C. P. 112.

(o) 4 Ch. 3, reversing S. C. 6 Eq.
149; *Loring v. Davis*, 32 Ch. D. 625.

(p) L. R. 6 Ex. 132, and 4 Ex.

203. See as to the judgment of
Lord Blackburn, in this case, *Merry*
v. Nickalls, 7 Ch. 733.

(q) *Cruse v. Paine*, 6 Eq. 641,
and 4 Ch. 411.

By the rules of the Stock Exchange, if a broker is declared a defaulter all his transactions on the Stock Exchange are closed at what is termed the hammer price (*r*), but this is a rule of the Stock Exchange which does not affect non-members (*s*). If, therefore, a broker agrees to purchase shares for an undisclosed principal and is declared a defaulter before the account day on which the shares are to be delivered and taken up, the selling jobber is nevertheless entitled to enforce the contract against the broker's principal, and if the principal declines to complete the contract on the account day, the jobber may sell the shares and recover from him the difference between the contract price and the price which the shares have realised, but neither the jobber nor the principal can insist on closing the transaction at the hammer price (*t*). This right is the consequence of the privity of contract which exists under the general law between the jobber and the broker's undisclosed principal, and is dependent upon its existence (*u*). In ordinary mercantile transactions if an agent, who is employed to buy a certain quantity of goods, contracts in his own name for the purchase of a different quantity, whether larger or smaller, there is no privity of contract between the seller and the agent's principal; and this is the case even if the agent has contracted to buy a larger quantity than his principal ordered and has allocated to his principal as much of this as

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In cases of
broker's default.

(*r*) See as to the rules of the Stock Exchange in cases of default, the cases in the next three notes, and *Tomkins v. Saffery*, 3 App. Ca. 213; *Ex parte Grant*, 31 Ch. D. 667; *King v. Hutton* [1900], 2 Q. B. 505; *Richardson v. Stormont, Todd & Co.* [1900], 1 Q. B. 701. A liquidation on the Stock Exchange does not operate as a release or a suspension of legal rights, *Ex parte Ward*, 20 Ch. D. 356; *Ratcliff and Dealtry v. Mendelssohn* [1901], 2 K. B. 844.

(*s*) *Levitt v. Hamblet* [1901], 2 K. B. 53.

(*t*) *Levitt v. Hamblet* [1901], 2 K. B. 53; *Scott and Horton v.*

Godfrey [1901], 2 K. B. 726. In *Anderson v. Beard* [1900], 2 Q. B. 260, Mathew, J., thought there was a usage entitling the principal to close the transaction at the hammer price if he wished, but the evidence in *Levitt v. Hamblet* showed this was not so. As to the jobber's right of action against the broker if the hammer price is less than the contract price, see *Ratcliff and Dealtry v. Mendelssohn* [1901], 2 K. B. 844.

(*u*) *Beckhuson and Gibbs v. Hamblet* [1901], 2 K. B. 73, affirming *ib.* [1900], 2 Q. B. 18, and the first two cases in the last note.

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is necessary to satisfy his order (*v*). The extent to which this rule is applicable to the sale and purchase of shares on the Stock Exchange has recently given rise to considerable discussion, but according to the latest decisions it would seem to be excluded by the usage of that market (*w*). In these transactions the privity, which is necessary to entitle the jobber to proceed against the broker's principal, may exist, whether the number of shares he has agreed to sell to the broker is less than the number the broker was employed to buy (*x*), or whether it is larger, and includes other shares purchased by the broker, either on his own account or for other principals; in the latter case the jobber and each principal of the broker become bound to each other to carry out that part of the contract which is applicable to the order of the particular principal (*y*).

2. *As to the position of the vendor and the ultimate purchaser.*

Contract between
vendor and his
transferee.

When the ticket containing the name of the ultimate purchaser issued by his brokers is delivered to the vendor, and he has executed a transfer of his shares, and that transfer has been accepted by the purchaser, and he has paid the price, it is plain that the vendor has become a trustee for the purchaser, and that the purchaser is bound to indemnify the vendor against all liability in respect of the shares (*z*). This has been decided even where the purchaser has not executed the transfer (*z*); and where the registration of the transfer cannot

(*v*) *Mollett v. Robinson*, L. R. 7 H. L. 802.

(*w*) In *Scott and Horton v. Godfrey* [1901], 2 K. B. 726, Bigham, J., thought that the privity would exist apart from any usage of the Stock Exchange, but in cases where the broker has combined the orders of several clients in one contract this view is opposed to *Beckhuson and Gibbs v. Hamblet* [1901], 2 K. B. 73, affirming *ib.* [1900], 2 Q. B. 18.

(*x*) *Leritt v. Hamblet*, 2 K. B. 53.

(*y*) *Scott and Horton v. Godfrey* [1901], 2 K. B. 726. Compare *Beck-*

huson and Gibbs v. Hamblet [1901], 2 K. B. 73, affirming *ib.* [1900], 2 Q. B. 18, where in the absence of any evidence of usage authorising a broker to combine several orders in one contract the jobber failed.

(*z*) *Paine v. Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Hodgkinson v. Kelly*, 6 Eq. 496; *Hawkins v. Maltby*, 6 Eq. 505, and 4 Ch. 200; *Shepherd v. Gillespie*, 5 Eq. 293, and 3 Ch. 764; *Sheppard v. Murphy*, 1r. Rep. 2 Eq. 544, and 16 W. R. 948; *Wynne v. Price*, 3 De G. & Sm. 310, and generally as to a

take place by reason of the stoppage of the company (a). The most recent decision on this point is *Loring v. Davis* (b), where the original contract was void under Leeman's Act, 30 Vict. c. 29, and the transfer had not been executed by the purchaser; but he had authorised his agents to accept the shares, and they had done so.

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Loring v. Davis.

Even before the Judicature Acts, where the vendor and ultimate purchaser had been thus brought into direct communication with each other, the vendor could sue the purchaser at law for such indemnity (c): for then, at all events, there was clearly a contract between them (d).

The precise moment when the contract in these cases is first created, has given rise to some difference of opinion, but the better opinion seems to be that a contract between the vendor and the ultimate purchaser exists, as soon as the ticket containing the purchaser's name has been handed, by his authority, to the vendor, and he has accepted the name, and indicated that acceptance to the purchaser (e). This opinion is based upon the ground that the ticket is drawn up and issued by the agent of the purchaser, who is authorised to use the machinery of the Stock Exchange, and to transmit the ticket to any person to whom the operation of that machinery may bring it. When that person is ascertained, and the ticket

Privity of
contract.

trustee's right to indemnity, *Hurdoun v. Belilios* [1901], A. C. 118.

(a) *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Holmes v. Symons*, 13 Eq. 66. Compare *Birmingham v. Sheridan*, 33 Beav. 660, which cannot now be relied upon. See, on it, 3 Ch. 393.

(b) 32 Ch. D. 625. The authority to accept the shares was revoked by one letter but conferred by another sent with it.

(c) *Kellock v. Enthoven*, L. R. 9 Q. B. 241; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Davis v. Haycock*, L. R. 4 Ex. 373; *Walker v. Bartlett*, 18 C. B. 845, reversing S. C. ib. 446; *Humble v. Langston*, 7 M. & W. 517. The action should be for not indemnifying the seller.

See *Sayles v. Blane*, 14 Q. B. 205, and 6 Ra. Ca. 79, and the cases above.

(d) See, as to this, *Hawkins v. Maltby*, 3 Ch. 188, where the contract was held to be misstated. This, however, was put right in the 2nd suit, 6 Eq. 505, and 4 Ch. 200.

(e) See acc. *per* Christian, L.J., *Sheppard v. Murphy*, 16 W. R. 948, 956; *per* Brett, J., in *Bowring v. Shepherd*, L. R. 6 Q. B. 309, 328; *per* Kelly, C. B., in *Davis v. Haycock*, L. R. 4 Ex. 373, 384-386. See, also, *per* Lord Blackburn, in *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132, 166. See, *contra*, Mr. Justice Lush's judgment in the same case. See, also, Fry, *Specific Performance*, 663, 3rd ed.

Bk. III. Chap. 4. is handed to him, an offer is made by the purchaser to buy
 Sect. 6. of the vendor, upon the terms specified on the ticket: and if the vendor accepts that offer, and informs the purchaser that he has done so, it is difficult to see that anything further is required to make a contract between the parties. This point, however, has ceased to be of the same importance as before the Judicature Acts: for now, if the relation of trustee and *cestui que trust* is shown to exist, it becomes unnecessary to consider whether there was a contract between the plaintiff and the defendant or not.

Duty to procure
 transfer.

Stray v. Russell.

It was settled in *Stray v. Russell* (f), that in sales on the Stock Exchange, it is not the duty of the seller of shares to procure their transfer to the purchaser; and that a person who buys shares through a broker may be compelled to pay for them, although the company may decline to accept him as a shareholder; and he has endeavoured to repudiate the shares. The facts of this case were as follows:—Some shares in the Royal British Bank were sold by the defendant to the plaintiff through brokers, who were members of the Stock Exchange. Soon after the sale the bank stopped payment, and the directors refused to allow any transfers of shares. The plaintiff, the purchaser, repudiated the purchase, and directed his broker not to pay the purchase-money. The broker, however, did pay it, as he was bound to do by the rules of the Stock Exchange. By the same rules it was incumbent on the purchaser, and not on the seller, to obtain the consent of the directors to the transfer. The plaintiff took no steps to procure such consent, and refused to repay his broker the money he had paid for the shares. This, however, the plaintiff was ultimately compelled to do by an action at law (g), and he then brought an action to recover their price from the seller. It was held that the action could not be sustained: 1. Because there had not been a total failure of consideration, inasmuch as the plaintiff had got the transfers and the certificates; 2. Because, by the rules of the Stock Exchange, it was not the duty of the seller to procure the consent of the

(f) 1 E. & E. 888. As to sales (g) See *Taylor v. Stray*, 2 C. B. not on the Stock Exchange, see pp. N. S. 175, 197.
 678 *et seq.*

directors to the transfers; and 3. Because the plaintiff was not himself ready and willing to perform the contract on his part.

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It follows that if the buyer has paid the seller or his broker on the receipt of a proper transfer (which is the usual practice), and the company declines to accept the buyer, he cannot recover from the seller the amount paid for the shares, the vendor himself being in no default (*h*).

London Founders' Association
v. Clarke.

A reasonable time for the transfer of shares bought and sold is implied in the contract for sale; and where the sale is made through brokers, the rules of the Stock Exchange fixing the time within which shares sold are to be delivered are admissible in evidence upon the question what is reasonable time, although the buying and selling brokers are not proved to be members of the Exchange (*i*). As to the delivery of certificates, see *ante*, pp. 677, 678.

Time for completing transfers.

A curious and instructive case arose in Ireland in which the same broker acted for both buyer and seller without their knowing it. He was instructed to sell shares in a company by some of his customers, and he was instructed to buy shares in the same company for others of his customers. He sent bought and sold notes to them respectively, and in his books he debited the buyers with the price and credited the sellers with the same amount. Some of the buyers sent him cheques for the money they had to pay. Others of the buyers had money in his hands. No money reached the sellers, and they knew nothing of what was being done about the payment of the purchase-money. The broker became bankrupt. The buyers sued the sellers for the shares: a decree was made in their favour, by the Court of first instance, but this was reversed on appeal, on the ground that the parties did not know that the same broker was acting for them, and that the vendors had not been paid, and that until they were, the purchasers were not entitled to the shares (*k*).

Same broker acting for both parties.

M'Devitt v. Connolly.

(*h*) *London Founders' Association v. Clarke*, 20 Q. B. D. 576.

(*i*) *Stewart v. Cauty*, 8 M. & W. 160. See, also, *Field v. Lelean*, 6 H. & N. 617, where evidence of a custom among mining sharebrokers to pay on delivery was held admis-

sible upon the question of reasonable time. In this case both the plaintiff and the defendant were mining sharebrokers.

(*k*) *M'Devitt v. Connolly*, 15 L. R., Ir. 500, reversing S. C., 13 ib. 207.

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3. *As to the position of the vendor and the undisclosed and intermediate purchasers.*

Undisclosed principals.

If the first purchaser is a broker buying for a principal, the liabilities of such principal are the same as the liabilities of a purchasing broker or jobber (*l*). These liabilities and the position of the principal in the event of the default of his broker have been already examined.

Intermediate purchasers.

But in the course of a sale on the Stock Exchange, the only persons who are brought into contact with the vendor are the first and ultimate purchasers. With the intermediate purchasers he has ordinarily nothing to do, and unless under exceptional circumstances, he has no rights against them (*m*). A vendor, for example, has ordinarily no remedy against an intermediate purchaser who passes the name of some one else as the ultimate purchaser and transferee (*n*).

But an intermediate jobber may enter into a contract with the vendor through his broker, and in such a case the intermediate jobber will be liable to the vendor for any breach of such contract (*o*).

Cestui que trust of transferee.

Moreover, if the ultimate purchaser is a mere nominee of and trustee for an intermediate purchaser, or for any one else, and the transfer to the ultimate purchaser is never registered, but the vendor continues the legal owner of the shares, and incurs liability in consequence, he is entitled to be indemnified against that loss by the person in whom the beneficial interest of the shares is really vested (*p*). This liability arises not out of any contract between the legal and beneficial owners; but from the relation of trustee and *cestui que trust* which exists between them (*pp*); and from the principle that the interposition

(*l*) See Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*m*) See, however, Lord Blackburn's judgment in *Maxted v. Paine*, L. R. 6 Ex. 167, 168.

(*n*) *Torrington v. Lowe*, L. R. 4 C. P. 26. Compare *Castellan v. Hobson*, 10 Eq. 47.

(*o*) As in *Allen v. Graves*, L. R.

5 Q. B. 478, where there was a special arrangement between the plaintiff's broker and the defendant, an intermediate jobber.

(*p*) *Castellan v. Hobson*, 10 Eq. 47; and see *ante*, pp. 695, 696.

(*pp*) That a trustee's right to indemnity does not rest upon contract, see *Hardoon v. Belilios* [1901], A. C. 118.

of intermediate trustees does not affect the rights of the legal and true equitable owner. Upon this principle it was held in *Brown v. Black* (q), that a vendor of shares who had transferred them to an infant, but whom he did not know to be such, was entitled to be indemnified by the real purchasers who had used the infant's name, although the infant had been registered in respect of the shares for two years. His infancy was discovered on the winding-up of the company; and, the transfer to him being invalid, the transferor became a contributory in his place, and then successfully claimed indemnity from the real owners of the shares (r).

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Brown v. Black.

For convenience of reference, the following analysis of the principal decisions, referred to in the preceding pages upon the rights of vendors, is appended :—

I. Vendor against jobber.

1. Successful actions and suits.

(a) Actions at law.

Maxted v. Paine, No. 1, L. R. 4 Ex. 81.

Allen v. Graves, L. R. 5 Q. B. 478.

In both of these the transferee was objected to.

(b) Suits in equity.

Merry v. Nickalls, L. R. 7 H. L. 530; 7 Ch. 733.

Heritage v. Paine, 2 Ch. D. 594.

Transferee an infant.

Cruse v. Paine, 6 Eq. 641, and 4 Ch. 441.

Registration guaranteed.

2. Unsuccessful actions and suits.

(a) Actions at law.

Grissell v. Bristowe, L. R. 4 C. P. 36, reversing L. R. 3 C. P. 112.

Maxted v. Paine, No. 2, L. R. 6 Ex. 132, and L. R. 4 Ex. 203.

In both of these the transferee had accepted the transfer.

(b) Suits in equity.

Coles v. Bristowe, 4 Ch. 3, reversing 6 Eq. 149.

Transferee had accepted the transfer.

Rennie v. Morris, 13 Eq. 203.

Transferee an infant; overruled by *Merry v. Nickalls*, 7 Ch. 733; and L. R. 7 H. L. 530.

(q) 8 Ch. 939, and 15 Eq. 363.

(r) Compare *Maynard v. Eaton*, 9 Ch. 414, a similar case, but where a compromise effected between the

plaintiff and the infant was held fatal to the plaintiff's claim. See, also, *Heritage v. Paine*, 2 Ch. D. 594.

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II. Vendor against ultimate purchaser.

1. Successful actions and suits.

(a) Actions at law.

Bowring v. Shepherd, L. R. 6 Q. B. 309.

Davis v. Haycock, L. R. 4 Ex. 373.

Walker v. Bartlett, 18 C. B. 845.

Humble v. Langston, 7 M. & W. 517.

Kellock v. Enthoven, L. R. 8 Q. B. 458, and 9 Q. B. 241.

Where the purchaser had himself transferred the shares.

(b) Suits in equity.

Wynne v. Price, 3 De G. & Sm. 310.

Paine v. Hutchinson, 3 Eq. 257, and 3 Ch. 388.

Shepherd v. Gillespie, 5 Eq. 293, and 3 Ch. 764.

Sheppard v. Murphy, Ir. Rep. 2 Eq. 544, and 16 W. R. 948.

Hawkins v. Maltby, 6 Eq. 505, and 4 Ch. 200.

Holmes v. Symons, 13 Eq. 66.

Loring v. Davis, 32 Ch. D. 625.

In none of these cases was the transfer executed by the transferee.

Evans v. Wood, 5 Eq. 9.

Hodgkinson v. Kelly, 6 Eq. 496.

In both of which the company had stopped.

2. Unsuccessful suits.

Hawkins v. Maltby, 3 Ch. 188, reversing S. C. 4 Eq. 572.

The case on appeal turned on the pleadings.

Birmingham v. Sheridan, 33 Beav. 660.

Not now to be relied upon. See *ante*, p. 695, note (a).

III. Vendor against *cestui que trust* of transferee.

(a) Successful suits.

Castellan v. Hobson, 10 Eq. 47.

Brown v. Black, 15 Eq. 363, and 8 Ch. 939.

Transfer to an infant.

(b) Unsuccessful suit.

Maynard v. Eaton, 9 Ch. 414.

Compromise with transferee held to be a defence.

IV. Purchaser against vendor.

M'Devitt v. Connolly, 15 L. R., Ir. 500, *ante*, p. 697.

4. As to the position of the real vendor and purchaser as regards their respective brokers.

Duty of selling broker.

The duty of a broker employed to sell is to sell according to his instructions if he can do so, and if he cannot, not to sell at all. His duty is performed when he has entered into a binding contract for sale, and has given the name of the buyer to his

employer (s). If the selling broker receives the price, it is his duty to hand it over to his principal; but it is no part of a selling broker's legal duty to his employer to procure payment of the price, nor to procure the execution by the purchaser of the transfer, nor to procure the registration thereof (t). Nor has it yet been decided that it is part of his duty to inquire into the solvency of the transferee (u). As between the vendor and his own broker, the sale is effected by the contract to sell, although the vendor may refuse to carry it out (x).

An authority to a broker or other agent to receive payment on behalf of his principal is an authority to receive payment in cash, and not otherwise (y), and it is the duty of any person making a payment to one whom he knows to be an agent to pay him in cash; if he pays him by a settlement of accounts between himself and the agent, this is not a good payment as against the agent's principal (z). Moreover, a custom to pay an agent in this manner is unreasonable, being in reality a custom to pay one man's debt with another man's money, and will not bind the principal unless it is clearly established that he knew of the custom and had assented to payment in this form (a). Further, if a person is known to the purchaser to be a broker and in the habit of selling in his own name on behalf of undisclosed principals, the purchaser is not entitled to set off a debt due from the broker to himself against a claim for the purchase-money by an undisclosed principal, though he did not know whether the broker in the particular transaction was selling as an agent or on his own account (b).

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Payment to
brokers.

(s) A broker who by disregarding the requirements of 30 Vict. c. 29, fails to effect a binding contract, is liable to his employer for negligence, see *Neilson v. James*, 9 Q. B. D. 546, *ante*, p. 676.

(t) See *Clark's Law of Joint Stock Companies* (Scotch), 145.

(u) See, on this subject, Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(x) *Ross v. Moses*, 1 C. B. 227.

(y) *Sweeting v. Pearce*, 9 C. B. N. S. 543; *Barker v. Greenwood*, 2 Y. & O. Ex. 414, and other cases in

the next few notes.

(z) *Pearson v. Scott*, 9 Ch. D. 198; *Crossley v. Magniac* [1893], 1 Ch. 594; *Richardson v. Stormont, Todd & Co., Ltd.* [1900], 1 Q. B. 701.

(a) *Pearson v. Scott*, 9 Ch. D. 198; *Sweeting v. Pearce*, 9 C. B. N. S. 543; *Bartlett v. Pentland*, 10 B. & C. 760; *Bayley v. Wilkins*, 7 C. B. 886; *Scott v. Irving*, 1 B. & Ad. 605; *Russell v. Banglely*, 1 B. & Ald. 395; *Todd v. Reid*, *ib.* 210.

(b) *Cooke v. Eshelby*, 12 A. C. 271; *Pearson v. Scott*, 9 Ch. D. 198; *Baring v. Corrie*, 2 B. & Ald.

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Payment by
cheque.

Payment by a cheque which is honoured is equivalent to payment in cash (c), but payment by a crossed cheque is in effect a payment to the payee's bankers, and if the payee is an agent it may be that he has no authority to accept payment in this manner (d).

Duty of buying
broker.

Again, the duty of a broker employed to buy is to buy according to his instructions if he can; and if he cannot, not to buy at all. He has no implied authority to enlarge the time for completing the purchase when that time has once been fixed; in other words, he has no implied authority to continue the account (e). If he exceeds his authority he exposes himself to liability to persons who rely on his having authority to buy, and are damnified by its absence (f).

Broker buying
what he was not
directed to buy.

A broker instructed to buy shares of a particular kind, fulfils his instructions if he buys what are commonly bought and sold as such shares in the share market. Thus, where a broker was instructed to buy "Kentish Coast Railway Scrip." and he bought what was known as such, and was paid for it, it was held, that he was not liable to refund the money he had received, although it turned out that what he had bought was scrip issued without due authority, and was in fact utterly worthless (g). Upon the same principle, if a broker is told to buy shares and he buys scrip; if nothing but scrip has found its way into the market, and if such scrip has been usually bought and sold as shares, and if there is nothing to show that the broker was to wait until shares were issued, he will be held to have pursued his authority (h).

137; *Richardson v. Stormont, Todd & Co., Ltd.* [1900], 1 Q. B. 701, where, however, the purchaser (defendant) knew the broker was the agent of the plaintiff. *Secus* if the purchaser believes an agent is selling as principal and has no reason to believe the contrary, *Montagu v. Forwood* [1893], 2 Q. B. 351.

(c) *Bridges v. Garrett*, L. R. 5 C. P. 451. *Secus* if it is not cashed, *Papé v. Westcott* [1894], 1 Q. B. 272, and see that case as to the liability of an agent who accepts

payment by cheque.

(d) *Bridges v. Garrett*, L. R. 5 C. P. 451. As to the banker's right to apply such money in payment of the broker's account, see *Thomson v. Clydesdale Bank* [1893], A. C. 282.

(e) See *Maxted v. Paine*, No. 1, L. R. 4 Ex. 81.

(f) *Ex parte Panmure*, 24 Ch. D. 367. See *ante*, p. 682.

(g) *Lamert v. Heath*, 15 M. & W. 486.

(h) *Mitchell v. Newhall*, 15 M. & W. 308. Compare *Kempson v. Saunders*, 4 Bing. 5.

Until the broker has acted upon his authority to buy, it may be revoked ; and if any money has been given him in order to enable him to pay for them, it may be demanded back (*i*). But this cannot be done after he has entered into a contract for purchase, and become personally responsible for the due performance of that contract (*k*). The death of the principal revokes a broker's authority to effect a continuation of his principal's account (*l*).

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Revocation of
broker's autho-
rity.

In a comparatively recent case (*m*) it was proved that, according to the usage of the Stock Exchange, a broker who is carrying over his customer's stock until the next settlement is entitled to close the account by a sale of the stock, if the balance of the differences then due to him is not paid on the pay day of the current settlement, provided that he has previously given his customer notice of the amount due, and the customer has not given him security for the amount, or sufficient cover to meet accruing differences ; this usage was held reasonable. It also appears that by the usage of the Stock Exchange a broker who is carrying over his customer's stock has a right to close the account by a sale of the stock if his customer becomes bankrupt or insolvent (*n*).

Broker's right
to sell to close
his customer's
account.

A sale of stock to close the account is equivalent to a repudiation by the broker for himself to accept, and for the jobber to deliver the stock ; and if the broker gives to the jobber who was to deliver the stock the name of the new purchaser, and the jobber accepts the name, the original transaction is at an end between all parties (*nn*).

Effect of a sale
to close an
account.

If when closing an account the broker sells the stock, and as part of the same transaction repurchases it on his own account, and is thereby enabled to repurchase at a lower price than he would have had to pay on a purchase in the market

Liability of
broker when
closing account.

(*i*) *Fletcher v. Marshall*, 15 M. & W. 755.

K. B. 493 ; *Erskine, Orenford & Co. v. Sachs*, ib. 504 ; and *Forget v. Baxter* [1900], A. C. 467.

(*k*) *McEwen v. Woods*, 11 Q. B. 13. See, also, *Read v. Anderson*, 13 Q. B. D. 779, affirming 10 Q. B. D. 100.

(*n*) *Lacey v. Hill, Scrimgeour's claim*, 8 Ch. 921, and *Crowley's claim*, 18 Eq. 182.

(*l*) *Haus v. Durant* [1900], 1 Ch. 209.

(*nn*) *Ellis v. Pond* [1898], 1 Q. B. p. 459. This is so, though no specific stock is bought or sold if the amount is the same.

(*m*) *Davis & Co. v. Howard*, 24 Q. B. D. 691. See, too, *Macoun v. Erskine, Oxenford & Co.* [1901], 2

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in the ordinary way, he must account to his principal for the profit so made (o).

Damages for
wrongfully
closing account

If a broker wrongfully closes his principal's account he will be liable to him in damages (oo); and if, after having agreed when carrying over an account to sell the stock at any time before the next settling day, if so directed, he wrongfully closes the account by a sale before that day, he will be liable to account to his principal for the highest value of the stock between the date of the sale and the settling day (p).

Right of broker
to indemnity.

A person who employs a broker to buy or sell is bound to indemnify him against any losses which he may incur by reason of his having contracted in his own behalf, and of being afterwards, without any default of his own, unable duly to complete his contract (pp). The following cases will serve to illustrate this doctrine.

1. Where a broker is employed to sell.

Sales through
brokers.
Sutton v.
Tatham.

In *Sutton v. Tatham* (q), a person ordered a broker to sell for him 250 shares. The broker entered into a contract for their sale, and was afterwards informed that a mistake had been made, and that fifty only were intended to be sold. The broker not being enabled to deliver the shares which he had agreed to sell, was compelled to make good to the purchaser the difference between the price agreed upon and the price at which the purchaser had procured shares elsewhere. It was held, that the broker was entitled to recover this difference from his employer.

Rayliffe v.
Butterworth.

In *Bayliffe v. Butterworth* (r), the defendant instructed the plaintiff, a broker, to sell shares for him, which the plaintiff accordingly did. When the time came for the delivery of the shares to the purchaser, the defendant made default, and did not furnish them. The plaintiff having been compelled by the

(o) *Erskine, Oxenford & Co. v. Sachs* [1901], 2 K. B. 504. As to the legality of closing an account in this manner, see *Macoun v. Erskine, Oxenford & Co.*, ib. 493.

(oo) *Ellis v. Pond* [1898], 1 Q. B. 426, and *Lacey v. Hill*, 8 Ch. 921, noticed *infra*, pp. 705 and 706.

(p) *Michael v. Hart & Co.* [1901], 2 K. B. 867.

(pp) See, in addition to the cases cited, *infra*, *Beckhuson & Gibbs v.*

Hamblet [1900], 2 Q. B. pp. 26, 27; *Young v. Cole*, 3 Bing. N. C. 724; *Child v. Morley*, 8 T. R. 610; *Bowlby v. Bell*, 3 C. B. 284; *Simpson v. Rand*, 1 Ex. 688. As to indemnifying one's broker against the costs of an action brought against him, see *Brown v. Hall*, 7 C. B. N. S. 503.

(q) 10 A. & E. 27.

(r) 1 Ex. 425. Compare this with *Bowlby v. Bell*, 3 C. B. 284.

rules of the Stock Exchange to pay the difference between the price agreed to be paid by the purchaser and that actually paid by him for other shares, was held entitled to recover such difference from the defendant.

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2. Where a broker is employed to buy.

In *Bayley v. Wilkins* (s), the defendant requested the plaintiff, a broker, to buy shares for him, which the plaintiff accordingly did. At the time of their purchase, a call had been made, but such call had not become payable. The plaintiff paid the amount of the call to the selling broker in pursuance of the rules of the Stock Exchange, and was held entitled to recover the money so paid from the defendant.

Purchases
through brokers.
Bayley v.
Wilkins.

In *Taylor v. Stray* (t), the defendant instructed the plaintiff, a broker, to buy some Royal British Bank shares for him. The defendant accordingly bought the shares, which were to be paid for on a future day. Before that day arrived, the bank stopped payment, and the defendant refused to take or pay for the shares. The plaintiff thereupon paid for them in compliance with the rules of the Stock Exchange; and he was held entitled to recover the money so paid from the defendant.

Taylor v. Stray.

In *Pollock v. Stables* (u), the plaintiff, in pursuance of the defendant's instructions, bought shares for him which the defendant neglected to take up. The broker who sold them, consequently re-sold them, and thereby a loss was sustained. The plaintiff, who was also a broker, made good this loss, as he was compellable to do by the rules of the Stock Exchange, and he was held entitled to recover the amount he had paid from the defendant.

Pollock v.
Stables.

In *Lacey v. Hill* (v), brokers bought stock for a customer

Lacey v. Hill.

(s) 7 C. B. 886. See, as to the evidence to be adduced by a broker who seeks to recover a call paid by him, *McEwen v. Woods*, 2 Car. & K. 330, and 11 Q. B. 13.

(t) 2 C. B. N. S. 175. See, too, *Stray v. Russell*, 1 E. & E. 888; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Biederman v. Stone*, ib. 504. The last two cases show that the

broker's right is not affected by § 153 of the Companies Act, 1862. See, further, as to the right of purchasing brokers to indemnity from their employers, *Mollett v. Robinson*, L. R. 7 H. L. 802; 7 C. P. 84, and 5 C. P. 646.

(u) 12 Q. B. 765.

(v) *Lacey v. Hill*, *Scrimgeour's claim*, 8 Ch. 921. See ib., *Crowley's*

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which they were to carry over until the next account day ; before that day arrived the customer suddenly died insolvent ; under these circumstances they were held entitled, according to the usage of the Stock Exchange, to sell the stock, and the sale thus being authorised, to prove against his estate for the loss they sustained. The decision was also rested on another ground, viz., that the brokers had, in accordance with their instructions, bought and paid for the stock, and had authority to sell it to recoup themselves the amount which they had paid for it, though they were not entitled to sell until the next account day ; the Court held that a sale before that day did not deprive them of their right to recover the amount they had paid for the stock, but only conferred on their customer a right to damages for any loss occasioned by a sale before that day, and that the sale had not in fact occasioned any loss (x).

Broker not
entitled to
indemnity for
his own default.
Duncan v. Hill.

But a broker is not entitled to indemnity from his employer in respect of loss arising from his own default. Thus in *Duncan v. Hill* (y), the plaintiffs, who were brokers on the Stock Exchange, were instructed by the defendant to buy shares for a certain account, and afterwards to continue it. This was done ; but before the final settling day arrived the brokers were declared defaulters, and according to the rules of the Stock Exchange all their transactions were peremptorily closed (z). The brokers were held entitled to be repaid the sum (1,688*l.*) paid by them in order to keep open the account at the defendant's request, but not those further sums which had become payable by reason of their own insolvency (a).

Ellis v. Pond.

In *Ellis v. Pond* (b), the plaintiff, a broker on the Stock Exchange, had purchased certain stock for the defendant ; it was then agreed that the plaintiff should take part of such stock

claim, 18 Eq. 182, and *infra*, *Ellis v. Pond*.

(x) Compare *Michael v. Hart & Co.* [1901], 2 K. B. 867, *ante*, p. 704.

(y) L. R. 8 Ex. 242, reversing S. C. 6 Ex. 255.

(z) As to the position in cases of default, see *ante*, p. 693, and cases there referred to.

(a) Compare *Hartas v. Ribbons*, 22 Q. B. D. 254, where the prin-

cipal ratified the closing of the account, and *Lacey v. Hill, Crowley's claim*, 18 Eq. 182, where the brokers became defaulters solely by reason of the previous default of their principal ; see, too, *Ex parte Pannure*, 24 Ch. D. 367.

(b) [1898], 1 Q. B. 426, Smith and Collins, L. JJ., Rigby, L. J., dissenting.

off the market by paying for it out of monies advanced by him, and should hold the stock as security for the advance; this was done: the plaintiff also on the defendant's instructions carried over the remainder of the stock until the next account day, and bought for the defendant more stock for that account day; it was also agreed that none of the stock should be sold before that day. Before the day arrived the plaintiff wrongfully, in breach of the agreement, sold the whole of the stock at a loss, "to close the account" (c). If the stock had been sold on the account day, there would still have been a loss, but the loss would not have been so great. Under these circumstances, the broker was held to be entitled to recover from the defendant the difference between the price paid by him for the stock taken off the market, and the price such stock would have realised had it been sold on the account day (d), subject to the defendant's right to damages occasioned by the wrongful sale of the stock before that day (e); but he was held not to be entitled to any indemnity in respect of the loss arising on the sale of the stock carried over to, or of the stock purchased for the next account day, for this loss, so far as it affected him, was occasioned by his wrongful sale; the sale rendered it impossible for the defendant to take up the stock on the account day in performance of his contract, whereas if the stock had not been previously sold, and the defendant had—as he might have done—taken up and paid for the stock on that day, the plaintiff would have come under no liability, and incurred no loss.

So, too, if a broker effects a continuation of his principal's account after his death, he is not entitled to be indemnified against the loss he has incurred by so doing (f). Bk. III. Chap. 4.
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Again, a broker who contracts to buy unnumbered shares in a joint stock bank, contrary to 30 Vict. c. 29, has no claim against his employer if he refuses to accept the shares, unless indeed he authorised a purchase contrary to the Act (g).

(c) As to the effect of this, see *ib.* p. 459, and *ante*, p. 703.

(d) See *ib.* p. 438, and *Duncan v. Hill*, L. R. 8 Ex. 242, as to the sum of 1,688*l.* in that case.

(e) See *Lacey v. Hill, Scrimgeour's*

claim, 8 Ch. 921, and *Michael v. Hart & Co.* [1901], 2 K. B. 867, *ante*, p. 704.

(f) *Haas v. Durant* [1900], 1 Ch. 209.

(g) *Ante*, p. 676.

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Rules of Stock
Exchange as dis-
tinguished from
usage of brokers.

After-made
rules.

Westropp v.
Solomon.

The cases above referred to establish as a general doctrine that what a broker, employed in buying and selling shares for another person, is compelled by the rules of the Stock Exchange to pay, in consequence of the non-performance by his employer of the contract entered into on his behalf, is recoverable from him by the broker. The principle of the decisions in question does not however extend further than this, viz., that brokers are impliedly authorised by those who employ them, to do what is usual and customary amongst brokers in matters such as those they are employed about. The cases which have been noticed do not show that persons who employ members of the Stock Exchange are affected by the rules of the Exchange without reference to the question of what is customary amongst its members; and in truth, to non-members, such rules are only important so far as they evidence usage. This is shown by the case of *Westropp v. Solomon* (h). There, the defendant employed the plaintiff, a broker, to sell ten scrip certificates, which the plaintiff did. It afterwards appeared that these certificates were forgeries, although neither the plaintiff nor the defendant had any suspicion that such was the case. The committee of the Stock Exchange made a rule to the effect that the purchasers of the spurious scrip should have a right to demand from the sellers not only repayment of the purchase-money, but also payment of an additional fixed sum. In compliance with this rule, the plaintiff repaid to the purchaser the money received from him, and also the additional sum fixed by the rule; but it was held, that the plaintiff was only entitled to recover from the defendant the money which the purchaser himself could have recovered at law; namely, the amount paid by him with interest; and it was held, that the rule, having been made after the sale, formed no part of that usage of brokers by which the defendant was bound.

Bankruptcy of
broker.

If a broker becomes bankrupt, any monies due to him on contracts made with jobbers form part of his general assets, and do not belong to the customers on whose account the

(h) 8 C. B. 345. See, also, 449, and 9 ib. 534, and other cases, *Sweeting v. Pearce*, 7 C. B. N. S. ante, p. 693, note (r).

contracts were entered into ; the remedy of the customer is to prove in bankruptcy for the amount (i). Bk. III. Chap. 4.
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Accounts sent in by sharebrokers to their employers may be shown not to have included charges which ought to have been included ; and this is true even where the persons to whom such accounts are sent have dealt with other people upon the faith of the accounts being full and correct (k). Brokers' charges.

A broker is not prevented from recovering commissions due to him by an omission to make out and send to his principal a contract note (l) ; but apparently he cannot recover his commission if he has made out a note, but it has not been duly stamped (m). Absence of
contract note.

A broker employed to buy or sell shares in an illegal company, or in a company which by law is not in a position to issue shares, cannot recover from his employer either any commission on the purchase or sale, or any money expended for him on account of such shares (n). Illegal purchases
and sales by
brokers.

(i) *King v. Hutton* [1900], 2 Q. B. 504, affirming [1899], 2 Q. B. 555.

(k) *Dails v. Lloyd*, 12 Q. B. 531.

(l) *Learoyd v. Bracken* [1894], 1 Q. B. 114 ; he incurs a penalty of 20*l.*, 54 & 55 Vict. c. 39, § 53 (1).

(m) 54 & 55 Vict. c. 39, § 53 (3), and *ante*, p. 677.

(n) *Josephs v. Pebrer*, 3 B. & Cr. 639 ; *Ex parte Neilson*, 3 De G. M. & G. 556. See, further, as to illegal sales through brokers, *Buck v. Buck*, 1 Camp. 547 ; and *Bousfield v. Wilson*, 16 M. & W. 185, both of which have been noticed already. See *ante*, p. 191.

CHAPTER V.

OF THE SURRENDER OF SHARES.

1. *General Observations.*

Bk. III. Chap. 5.

Retirement by
surrender.

THE right of a shareholder to retire from a company of which he is a member, by surrendering his shares to the company, depends upon the Acts of Parliament, charter, or regulations or customs which govern the company in question. Where there is nothing enabling a shareholder to retire by surrendering his shares, the ordinary partnership rule applies, and no surrender can be made except with the consent of all the shareholders (a). If such a method of withdrawing from the company is authorised by its constitution, a surrender by a shareholder of his shares will of course be valid, if all the formalities which may be necessary are duly complied with; and where the power to surrender exists, the due observance of all necessary formalities will be presumed in favour of a shareholder who has in fact *bonâ fide* retired from the company, and whose shares have been cancelled or otherwise disposed of by the company (b).

Power of majority to bind minority with reference to the relinquishment of shares.

The right of a shareholder to retire by surrendering his shares, is not one of those matters as to which a majority of members binds a minority, or as to which directors have any implied authority to represent the company. Both principle and authority are clearly opposed to any such doctrine (c). Nor if directors have power to accept a surrender of shares

(a) See volume on Partnership, pp. 577 *et seq.* Retirement by transfer is quite another matter, and has been already referred to.

(b) See *Lane's case*, 1 De G. J. & Sm. 504; *Kipling v. Todd*, and *Kipling v. Allan*, 3 C. P. D. 350. The retirement must be complete, see *Barry v. Navan and King's County Rail. Co.*, 4 L. R. Ir. 68.

(c) *The Plate Glass, &c., Co. v. Sunley*, 8 E. & B. 47, is not inconsistent with this nor with the cases referred to in the text; in that case the demurrer admitted that the company had accepted the surrender of the shares then in question. See as to special resolutions under the Companies Act, 1862, *infra*, p. 719.

can they delegate this power to a manager (*d*). At the same time if shares have been surrendered with the knowledge of all the shareholders under circumstances fully disclosed to them all, and such surrender has not been questioned for a considerable period, the company will be precluded from afterwards disputing the validity of the surrender (*e*). The following are leading authorities upon this subject:—

Morgan's case (*f*). The company's deed authorised the directors to buy up, out of certain specified funds of the company, any shares which might be offered for sale. An extraordinary general meeting resolved that if any shareholder should be desirous of withdrawing from the company, the directors should be at liberty to purchase his shares upon certain specified terms. A shareholder acted upon this resolution, complied with the terms, and sold his shares to the company. But it was held that the resolution was not binding on the company; and that the shareholder in question was properly made a contributory, although nearly five years had elapsed since his withdrawal. *Morgan's case.*

Stanhope's case (*g*). The directors had power generally to act as might appear to them best for the interest of the company. A dispute arose amongst them, and one of them retired, and his shares were surrendered and cancelled. It was held that his retirement was unauthorised, and he was put on the list of contributories ten years after his shares had been cancelled. *Stanhope's case.*

(*d*) *Cartmell's case*, 9 Ch. 691.

(*e*) As in *Brotherhood's case*, 31 Beav. 365, and 4 De G. F. & J. 566; noticed *infra*, pp. 712 and 716, and *Hunt's case*, 32 Beav. 387. Implied notice to the directors of the company through the books of the company is not enough. *Hallmark's case*, 9 Ch. D. 329; *Denham & Co.*, 25 Ch. D. 752; *Cartmell's case*, 9 Ch. 691, where the directors had power to accept surrenders. See, as to estoppel by conduct, *ante*, pp. 65 *et seq.*

(*f*) 1 De G. & S. 750, and 1 Mac. & G. 225. *Richmond's Execu-*

tors' case, 3 De G. & Sm. 96, and *Lawes' case*, 1 De G. M. & G. 421, were similar decisions with respect to other shareholders in the same company. Compare *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(*g*) 3 De G. & S. 198. See, too, *Esparto Trading Co.*, 12 Ch. D. 191; *Daniell's case*, 22 Beav. 43, affirmed 3 Jur. N. S. 803; *Walter's case*, 3 De G. & S. 244; *Holt's case*, 1 Sim. N. S. 389; and compare *Cockburn's case*, 4 De G. & S. 177, and *Busk's case*, 3 ib. 267; and observe the larger powers of the directors in

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Munt's case.

Munt's case (h). The directors of a company, disagreeing as to the mode of managing its affairs, and being divided into two parties, it was resolved that one of the two parties should retire, and that the other should take the management of the company and relieve the first from their liabilities. The directors composing one of the two parties did accordingly retire, and relinquish their shares in favour of the company; but it was held that their retirement was altogether unauthorised and invalid, and that they were contributories on the winding up of the company.

Agriculturist
Cattle Insurance
Company.

The principles laid down in these cases were very much considered in the course of winding up the *Agriculturist Cattle Insurance Company*. The company was formed in 1845. In 1848 it had got into difficulties, and several shareholders wished to retire. This they could not do consistently with the company's deed of settlement. An arrangement, however, was made in November, 1848, under resolutions passed at a meeting of shareholders specially convened for the purpose, to the effect that a call of 4*l.* per share should be made, and that those shareholders who wished to retire should, on a particular day, pay part only of the call, and that their shares should be forfeited for non-payment of the rest. Under this arrangement many persons retired at once; many, however, remained, and of those some retired afterwards under various arrangements made between themselves and the directors. In 1861 the company was ordered to be wound up, and in the course of such winding up it was held—1. That having regard to the publicity and *bona fides* of the arrangement come to in November, 1848, and to the time which had since elapsed, the validity of the retirement of those shareholders who withdrew in pursuance of that arrangement could not be disputed, and that those persons therefore were not liable to be placed on the list of contributories (i). 2. That those persons who retired afterwards by arrangement with the directors, but without the

Brotherhood's
case.

Smallcombe's
case.

Spackman's
case.

the first, and the adoption of their acts in the last, of these two cases.

(h) 22 Beav. 55. See, too, *Bennett's case*, 18 Beav. 339, and 5 De G. M. & G. 284; *Richmond's case*,

and *Painter's case*, 4 K. & J. 305.

(i) *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Brotherhood's case*, 31 Beav. 365, affirmed 4 De G. F. & J. 566.

knowledge of the other shareholders, were to be treated as Bk. III. Chap. 5. shareholders still, and were liable to be placed on the list, Houldsworth's case. although twelve years had elapsed since their retirement and the winding-up order (*k*).

Moreover, where persons have only agreed to take shares, and have not become actual shareholders, the directors have no implied power to release them from their agreement (*l*). Nevertheless, an express power to accept a surrender of shares, or to rescind and abandon contracts, has been held to apply to contracts to take shares and to authorise a release of a person from his agreement to become a member (*m*).

The foregoing decisions sufficiently establish the doctrine Directors have no power to buy out shareholders. that in the absence of a special authority enabling them so to do, directors have no power to bind the company by buying each other out; nor by buying out shareholders; nor by accepting the surrender or relinquishment of shares to the company (*n*). Moreover, if the directors of a company misapply its funds by buying up shares in the company, they are compellable to make good to the company the money so expended, with interest (*o*).

It is necessary, however, to distinguish the retirement of a shareholder from the refusal of a person to be a shareholder in a concern which he never agreed to join (*p*); and it has very Retirement of shareholders compared with refusal to accept shares.

(*k*) *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263; *Stanhope's case*, 1 Ch. 161; *Stewart's case*, ib. 511. See, on these cases, the note *infra*, pp. 715 and 716.

(*l*) *Hall's case*, 5 Ch. 707; *Adams' case*, 13 Eq. 474.

(*m*) *Snell's case*, 5 Ch. 22; *Thomas' case*, 13 Eq. 437; and compare *Kipling v. Todd*, 3 C. P. D. 350, *infra*, 719, where the Court presumed a surrender of shares which directors had under a special Act.

(*n*) See, further, *Trevor v. Whitworth*, 12 App. Ca. 409, and the criticisms therein on *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *London and Provincial Coal Co.*, 5 Ch. D.

525; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Walker's case*, 2 Jur. N. S. 1216, L. J.; *Playfair v. Birmingham, Bristol, &c., Co.*, 1 Ra. Ca. 640; *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422; *Burt v. British Nation Life Assur. Assoc.*, 4 De G. & J. 158; *Paul and Beresford's case*, 10 Jur. N. S. 692, M. R.

(*o*) *Evans v. Coventry*, 8 De G. M. & G. 835. See decree, par. 4, varying pars. 5 and 6 of the decree in the Court below. See *ante*, p. 520.

(*p*) See *Pim's case*, 3 De G. & S. 11, and 1 Mac. & G. 291; *Henessy's case*, 2 Mac. & G. 201, and 3 De G.

Bk. III. Chap. 5. properly been held that the principle of the above decisions does not apply to the case of a person who, having taken shares in a company formed for given objects, relinquishes such shares and retires from the company, upon a change being made in those objects without his consent (*q*). So, if it is doubtful whether a person ever was a shareholder or not, an agreement releasing him from all liability, if any, may be validly made, so as to bind the company (*r*); and an allotment of shares made pursuant to an invalid resolution may be properly cancelled at all events before the shares are registered in the name of the allottee (*s*). But a general power to compromise does not authorise an agreement to allow a shareholder to retire when there is no dispute as to his membership, and where there is no power to buy or accept a surrender of shares (*t*).

Compromise with doubtful shareholder.

Surrender of shares to company compared with a transfer of them to the directors.

It is further necessary to distinguish the retirement of a shareholder by relinquishing his shares to the company, from his retirement by transferring his shares to some or one of the directors of the company upon their own individual account. For whilst, in the absence of special authority, it is not competent for directors to accept on behalf of a company the surrender of shares held in the company, it is as competent for the directors of a company, as for anybody else, to accept shares in the company from such shareholders as may be willing to transfer them in the ordinary way. Consequently, an agreement between the directors and some of the shareholders of a company to the effect that the latter shall relinquish their shares and transfer them to the directors, is not *ultra vires*, or in any way illegal, if the agreement is with the directors as

& S. 191, as to placing shares in a person's name without authority. See *ante*, pp. 22 *et seq.*

(*q*) *Meyer's case*, 16 Beav. 383.

(*r*) *Bath's case*, 8 Ch. D. 334; *Lord Belhaven's case*, 3 De G. J. & Sm. 41; *Dixon's case*, L. R. 5 H. L. 606, reversing 5 Ch. 79. See *Wright's case*, 7 Ch. 55, reversing S. C. 12 Eq. 331; *Fox's case*, 5 Eq. 118.

(*s*) *Barnett's case*, 18 Eq. 507.

(*t*) See L. R. 3 H. L. 188, 231;

Adams' case, 13 Eq. 474; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Dixon's case*, 5 Ch. 79, was decided on the principle that there can be no compromise where there is no dispute; and although the House of Lords reversed the decision, see L. R. 5 H. L. 606, the principle is unquestionable. See *Mercantile Investment Trust Co. v. International Co. of Mexico* [1893], 1 Ch. 484, note. Comp. *Wright's case*, 7 Ch. 55.

individuals, and not with them as representing the company (u). Bk. III. Chap. 5. Moreover, provision may be made by the company's regulations, whereby members are bound to transfer their shares, if called upon to do so, at a price to be fixed in a particular way, and whereby those engaged in the management of the company are given a right of pre-emption at that price, and such a provision, if otherwise free from objection, will be binding on the members (x). If a shareholder transfers his shares to a director or to an ordinary individual, without notice that the director is acting on behalf of the company, the transferor does effectually retire from the company; although had he known that he was in fact surrendering his shares to the company, the surrender would have been invalid (y).

Moreover, directors who individually agree to accept a surrender of shares and to indemnify the surrenderor against calls, are personally bound by their agreement, whether it is, as regards the company, *ultra vires* or not (z).

NOTE ON SMALLCOMBE'S CASE, SPACKMAN'S CASE, AND HOULDS-
WORTH'S CASE, REFERRED TO ABOVE, P. 712.

Smallcombe retired in strict accordance with the arrangement come to in 1848.

Houldsworth retired pursuant to the same arrangement, with this exception, that he did not retire within the time fixed thereby, but shortly afterwards; the time having been extended by the directors.

Spackman retired pursuant to another agreement altogether, come to between him and the directors for compromising litigation between him and the company.

The House of Lords held,—

1. That the arrangement of 1848 was one by which a majority of shareholders could not bind a minority.

2. That, nevertheless, the minority might be precluded from disputing it.

3. That *all* the shareholders must be treated as having had notice of it, and that as they had allowed it to be carried out, and had not disputed its validity for many years, they were *all* precluded from disputing it.

(u) *Haddon v. Ayers*, 1 E. & E. 118. See, too, *Jessopp's case*, 2 De G. & J. 638. In *Cartmell's case*, 9 Ch. 691, the directors never assented to the transfer made to them.

(x) *Borland's Trustee v. Steel*

Brothers, Ltd. [1901], 1 Ch. 279.

(y) See *Hollway's case*, 1 De G. & S. 777; *Ex parte Bagge*, 13 Beav. 162; *Nicols' case*, 3 De G. & J. 387.

(z) *Barker v. Allan*, 5 H. & N.

61.

Bk. III. Chap. 5.

4. That consequently *Smallcombe* was not a contributory (a).

5. That the agreement with *Houldsworth* differed in an essential particular from the arrangement of 1848, and was one which the directors had no power to enter into.

6. That all the shareholders could not be treated as having had sufficient notice of the agreement with him to preclude them from disputing it, even after the lapse of many years.

7. That consequently *Houldsworth*, or, he being dead, his executors were contributories.

8. That the agreement with *Spackman* was one which the directors had no power to make.

9. That all the shareholders could not be treated as having had sufficient notice of it to preclude them from disputing it, even after the lapse of many years.

10. That he therefore was also a contributory (b).

The Lords were by no means unanimous in their decision, and Lord St. Leonards, in a judgment which the writer ventures to think ought to have prevailed with the House, gave his opinion, that in all three cases the company ought to be held precluded from disputing transactions so long passed as those in question, and all of which were perfectly *bonâ fide*. The same view was taken by Lord Romilly when the cases were before him (see 1 Ch. 163). As the decisions stand, however, they are extremely difficult to reconcile on satisfactory grounds; for the notice which the shareholders had in *Houldsworth's* and *Spackman's* cases was little if at all less full than the notice they had in *Smallcombe's* case. Some general principles of value, however, can be extracted from these three cases. They show—

1. That a company will be precluded from disputing the validity of transactions sanctioned by a general meeting, but not binding on absentees, if such transactions are *bonâ fide*, and such as all the shareholders, if *vi juris*, could sanction, and if it can be inferred that all the shareholders were informed of them, and if no steps have been taken for a considerable time to impeach them.

2. That information on the part of all the shareholders, sufficient for the purpose in question, must be inferred from notices sent to them all, in the usual way, telling them what has been done; but not from reports, &c., not distinctly giving them this information.

3. That powers of compromise and powers of forfeiture must be *bonâ fide* exercised for the purposes for which they are conferred, and that attempts to make them available for other purposes will not succeed.

This view of their joint effect is supported by *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, where the Court of Common Pleas held that a company had ratified a purchase of shares which the directors had no power to make.

(a) *Brotherhood's case*, 31 Beav. 365, affirmed 4 De G. F. & J. 566, like *Spackman's*.
 (b) *Stanhope's case*, 1 Ch. 161, was like *Smallcombe's*.

2. *Surrender in particular companies.*

It is necessary now to advert to the right to retire by surrender of shares in the various classes of companies which exist in this country.

The rules of building societies invariably provide for the withdrawal of their unadvanced members, and the terms on which they can retire depend entirely on the rules (*c*). These rules can be altered, and if such alteration is made *bonâ fide* in the interests of the society, the alteration will be binding on the members (*d*). But the terms upon which a member is entitled to retire cannot be varied without his consent, except by an alteration of the rules. Thus, where the rules enabled unadvanced members to withdraw the sum at their credit in the society's books, it was held that so long as the society was not in liquidation any unadvanced member was entitled to withdraw the amount at his credit in the books, although the assets of the company had become depreciated, and a majority of the members had passed a resolution to the effect that 7s. 6d. per pound should be deducted from the amounts at the credit of the members, and be carried to a suspense account (*e*). The power to withdraw ceases when there is a stoppage of the company's business or a recognition by its officers that the business must be stopped (*f*).

The right of a shareholder in a cost-book mining company to retire from the company upon the relinquishment of his

Building societies.

Auld v. Glasgow Build. Soc.

Cost-book companies.

(*c*) See *Tosh v. North British Build. Soc.*, 11 App. Ca. 489; *Walton v. Edge*, 10 ib. 33; *Brownlie v. Russell*, 8 ib. 235; *Sheffield and S. York Perm. Build. Soc.*, 22 Q. B. D. 470. *West Riding, &c., Build. Soc.*, 43 Ch. D. 407.

(*d*) See *Pépé v. City and Suburban, &c., Build. Soc.* [1893], 2 Ch. 311. *Botten v. City and Suburban, &c., Build. Soc.* [1895], 2 Ch. 441. *Strohmenger v. Borough of Finsbury, &c., Soc.* [1897], 2 Ch. 469, and compare *Sixth West Kent Build. Soc. v. Hills* [1899], 2 Ch. 60, &

Sixth West Kent, &c. v. Shove, ib. p. 64, note. See, too, *ante*, p. 462, and *infra*, Appendix III.

(*e*) *Auld v. Glasgow, &c., Build. Soc.*, 12 App. Ca. 197. Compare *Strohmenger v. Borough of Finsbury, &c., Soc.* [1897], 2 Ch. 469, where the rules were altered. See, too, *Botten v. City and Suburban, &c., Build. Soc.* [1893], 2 Ch. 311, where an alteration of the right by the instrument of dissolution was held invalid.

(*f*) *Ambition, &c., Build. Soc.* [1896], 1 Ch. 89; *Barnard v. Tomson*

Bk. III. Chap. 5. shares, and payment of what may be due from him to the company, is established by custom, and is therefore imported into the contract by which the members of such companies are mutually bound (*g*); and where it was proved to be the practice of a cost-book company to allow shareholders to retire upon any terms agreed upon at general meetings, it was held that a shareholder who had been allowed at a general meeting to surrender his shares without paying the arrears of calls upon them, had ceased to be a shareholder (*h*). The surrender must be by notice in writing to the purser (*i*), and must be delivered at least six weeks before a resolution is passed or an order made to wind up the company (*k*).

Usual terms of retirement.

The usual terms on which a member is entitled to retire from a cost-book company are, that if the company is insolvent, the retiring member pays his share of the deficiency, as if the company were being wound up, but if the company is solvent he is entitled to receive his share of the surplus left, on deducting the liabilities from the value of the assets. In ascertaining these amounts, the solvency or insolvency of the remaining shareholders had formerly to be taken into account, and the assets valued on the footing of the company being a going concern (*l*). Now, the valuation of the assets is to be made upon the basis that the continuing shareholders had also relinquished their shares (*m*). The terms of retirement may be varied by agreement, which may be implied from the course of practice in the company, but such an agreement is not nearly so readily implied in the case of large companies as in the case of ordinary partnerships (*n*).

Companies
Clauses Acts.

The Companies Clauses Consolidation Act, 1845, contains no provision authorising the surrender of shares. But by the

[1894], 1 Ch. 374; *Sunderland 36th, &c., Build. Soc.*, 24 Q. B. D. 394.

(*g*) See, as to this, *infra*, and *Ex parte Palmer*, 7 Ch. 286; *Fenn's case*, 4 De G. M. & G. 285, and 1 Sm. & G. 26; *Bodmin United Mines*, 23 Beav. 370; *Birch's case*, 2 De G. & J. 10; *Lofthouse's case*, ib. 69; *Northey v. Johnson*, 19 L. T. 104.

(*h*) *Bodmin United Mines*, 23 Beav. 370.

(*i*) 32 & 33 Vict. c. 19, §§ 21-23.

(*k*) 50 & 51 Vict. c. 43, § 22.

(*l*) *Frank Mills Mining Co.*, 23 Ch. D. 52, and cases in note (*g*).

(*m*) 50 & 51 Vict. c. 43, § 21. See the section.

(*n*) *Frank Mills Mining Co.*, 23 Ch. D. 52.

Companies Clauses Act, 1863 (*o*) (which applies to all companies which have a special Act of Parliament incorporating that Act), it is enacted (§ 9) that "the company may from time to time accept, on such terms as they think fit, surrenders of any shares which have not been fully paid up;" and (§ 10) that "the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share."

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In *Kipling v. Todd* and *Kipling v. Allan* (*p*), *Todd* and *Kipling v. Todd*. *Allan* were nominated in a company's special Act as directors, and their qualification was the possession of 50 shares each. *Todd* resigned his directorship, and never acted as director; *Allan* did for a short time, and then resigned. Neither of them ever had any shares allotted to them, nor ever had any registered in his name. Moreover, all the company's shares were allotted to other people. Under these circumstances, a surrender by *Todd* and *Allan* of their shares, and an issue of them by the company to other persons were presumed; and *Todd* and *Allan* were held not liable to creditors of the company whose debts had accrued after their resignations.

Neither the Companies Act, 1862, nor the regulations in Table A. to that Act, authorise the retirement of a member by surrendering his shares to the company; and the effect of a surrender of shares, unless it be in exchange for others, is to diminish the capital of the company. Nevertheless, it has been held that the holder of unpaid-up shares in a company registered with limited liability, can surrender his shares without first paying them up in full if the articles as originally framed or as altered by special resolution (*q*) authorise such a surrender (*r*). And the power to surrender has been regarded

Companies Act,
1862.

(*o*) 26 & 27 Vict. c. 118.

(*p*) 3 C. P. D. 350. Compare *Portal v. Emmens*, 1 C. P. D. 201 & 664.

(*q*) *Teasdale's case*, 9 Ch. 54, where, however, the effect of all the resolutions taken together was to increase the unpaid-up capital. See

as to this case, *Trevor v. Whitworth*, and *Hope v. International Financial Soc.*, 4 Ch. D. 327.

(*r*) *Teasdale's case*, 9 Ch. 54; *Marshall v. Glamorgan Iron Co.*, 7 Eq. 129; and see *Wright's case*, 12 Eq. 336, note; *Snell's case*, 5 Ch. 22.

Bk. III. Chap. 5. as open to no more objection on the ground that it reduces the capital than a power to forfeit(s), the legality of which is unquestioned. (See Table A. and the next chapter.) But a power to forfeit is only operative where a shareholder cannot or will not pay up his calls, and is far less open to abuse in order to reduce capital than a power to surrender. And in the most recent case on the subject a surrender of shares not fully paid up was held to be equivalent to a purchase of the shares by the company at the price of discharging the shareholders from their liability to calls, and therefore *ultra vires* (t); but even then lapse of time may render the transaction unimpeachable (u). It has, however, been decided that a company may, on an increase of capital, allot preference shares part of such increase as fully paid-up in consideration of the surrender of an equivalent amount of fully paid-up ordinary shares, provided that the surrenders are made *bonâ fide* and not for the purpose of enabling shareholders to escape liability (x).

Company buying
its own shares.
Trevor v.
Whitworth.

It is now settled that a limited company governed by the Companies Act, 1862, cannot lawfully apply its funds in buying up its own shares, even if empowered so to do by its original articles (a), or by special resolution (b), or even by its memorandum of association. This last point has not been actually decided, but is practically determined by the decision of the House of Lords in *Trevor v. Whitworth*, and the judgment of Lord Macnaghten is clear upon the point (c). The consequences of this are very serious to persons selling their

(s) *Dronfield Silkestone Coal Co.*, 17 Ch. D. 76, which, however, was disapproved, and practically overruled by the House of Lords in *Trevor v. Whitworth*, *infra*.

(t) *Bellerby v. Rowland and Marwood's Steamship Co.* [1901], 2 Ch. 265.

(u) [1901], 2 Ch. 265, and Lord Macnaghten's comments on *Dronfield Silkestone Coal Co.* in 12 App. Ca. p. 440.

(x) *Eichbaum v. City of Chicago*

Elevators, Ltd. [1891], 3 Ch. 459, following *Teasdale's case*.

(a) *Trevor v. Whitworth*, 12 App. Ca. 409. *Dronfield Silkestone Coal Co.*, 17 Ch. D. 76, *contra*, must be considered as overruled on this point.

(b) *Hope v. International Financial Society*, 4 Ch. D. 327, which compare with *Teasdale's case*, *ante*, note (q).

(c) See *Trevor v. Whitworth*, 12 App. Ca. 409, pp. 432 *et seq.*

shares in such companies to the companies themselves, or Bk. III. Chap. 5. surrendering their shares to the companies for value paid by the companies. The transaction being *ultra vires*, it will follow that any money paid by the company for the shares can be recovered back; that the directors paying it and the shareholders receiving it, will be liable for it, and that the surrender itself will be invalid unless indeed the transaction can be upheld in part, and set aside in part, which may be possible in some cases, but practically in very few.

A limited company may, however, purchase or accept a Surrender on reduction of capital. surrender of its shares on a reduction of capital, if such reduction is sanctioned by the Court and carried out in accordance with the requirements of the Acts (d).

There is nothing in the Companies Acts to prevent an Unlimited companies. unlimited company from being formed and registered under them with a constitution allowing its members to withdraw from membership in the manner provided by its memorandum and articles of association, and thus cease to be liable to its creditors, unless it is wound up within twelve months after their retirement. The Court also expressed an opinion that such a company might validly provide by its memorandum for a return of capital to its members (e).

Members of a voluntary society the rules of which contain Voluntary Society. no provisions as to retirement, may retire at pleasure. A member who sends in his resignation thereby ceases to be a member; his resignation does not need acceptance to complete it; it therefore cannot be withdrawn after it has been sent in (f).

(d) *British and American Corp. v. Couper* [1894], A. C. 399; *London and New York Invest. Corp.* [1895], 2 Ch. 860; *Denver Hotel Co.* [1893], 1 Ch. 495; *Dicido Pier Co.* [1891], 2 Ch. 353; *Gutling Gun, Ltd.*, 43 Ch. D. 628, and *ante*, pp. 557, 558.

(e) *Borough Commercial, &c., Build. Soc.* [1893], 2 Ch. 242, and *Comp. Act*, 1862, § 38 (1).

(f) *Finch v. Oake* [1896], 1 Ch. 409. See, too, as to the effect of sending in a resignation, *Maitland's case*, 4 D. G. M. & G. 769; *R. v. Corporation of Wigan*, 14 Q. B. D. 908.

CHAPTER VI.

OF THE FORFEITURE OF SHARES.

Bk. III. Chap. 6.

Right of company to forfeit shares.

COMPANIES have no power to forfeit the shares of their members, or of subscribers who have not yet become members, unless such power is specially conferred upon them (a). A clause in a company's articles enabling the directors to forfeit the shares of any member who shall take any legal proceedings against the company is invalid (b).

The right to forfeit shares is frequently arrogated in cases where a shareholder will not pay to the company what is due to it from him in respect of his shares: and it is not uncommonly assumed that a right to forfeit in such a case is possessed as a matter of course by directors. But this opinion is erroneous; for, as already stated, a right to forfeit exists only when specially conferred; and even a majority of shareholders cannot confer it unless empowered so to do by the company's Act, charter, deed of settlement, or regulations (c). But if there is power to forfeit for non-payment of calls, that power may be extended to non-payment of additional capital which may be authorised to be raised (d).

(a) *Hart v. Clarke*, 6 De G. M. & G. 232, and 6 H. L. C. 633; *Norman v. Mitchell*, 5 De G. M. & G. 648; *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46. As to companies partly English and partly foreign, see *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43. As to the right of corporations to disenfranchise and expel members for reasonable cause, see *Osgood v. Nelson*, L. R. 5 H. L. 636; *Grant on Corporations*, 262-269. As to expulsion from a club, see *Hopkinson v. Marquis of Exeter*, 5 Eq. 63; *Fisher v. Keane*, 11 Ch. D. 353;

Labouchere v. Earl of Wharnccliffe, 13 Ch. D. 346; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Baird v. Wells*, 44 Ch. D. 661; and from a trade association, *Strick v. Swansea Tin Plate Co.*, 36 Ch. D. 558; *Rigby v. Connol*, 14 Ch. D. 482.

(b) *Hope v. International Financial Society*, 4 Ch. D. 327.

(c) *Barton's case*, 4 Drew. 535, affirmed on appeal, 4 De G. & J. 46. See, too, *Partnership Act*, 1890. § 25. As to the *Companies Act*, 1862, see *infra*.

(d) See *Kelk's case*, 9 Eq. 107.

By the Stannaries Act, 1869, a cost-book mining company Bk. III. Chap. 6. has power by a resolution passed at a meeting with special notice (e), to forfeit (f) shares for the non-payment of calls, Forfeiture of shares in cost-book companies. after notice requiring payment has been given by the company (g). Shares when forfeited become the property of the company, and may be disposed of as it thinks fit.

The only other general legislative enactment now in force (h), Statutes authorising forfeiture of shares. which expressly confers on companies the power of forfeiting the shares of their members, is the Companies Clauses Consolidation Act. The Companies Act of 1862 does not itself contain any provisions on this subject, but the Table A. to that Act does, as will be seen presently (i).

As to companies governed by the Companies' Clauses Consolidation Act, it is provided by 8 & 9 Vict. c. 16, §§ 29-35, Forfeiture of shares in companies governed by 3 & 9 Vict. c. 16. that if any shareholder fail to pay any call payable by him, the directors, at any time after the expiration of two months from the day appointed for the payment of a call, may declare the share in respect of which such call was payable forfeited, whether the call has been sued for or not. But before declaring any share forfeited, the directors must give notice of their intention to do so, twenty-one days at least before making a declaration of forfeiture. After a share has been declared forfeited, it may be sold for payment of the calls in arrear; but before it is so sold, the declaration of its forfeiture must be confirmed, and its sale must be ordered at a general meeting held not sooner than two months after the day on

(e) For what constitutes such a meeting, 32 & 33 Vict. c. 19, § 5.

(f) *Ib.* §§ 16 & 17, and see *Rule v. Jewell*, 18 Ch. D. 660, and before the Act *Hart v. Clarke*, 5 D. G. M. & G. 232, and 6 H. L. C. 633.

(g) For the service of notices by the company, see *ib.* § 8.

(h) The 7 & 8 Vict. c. 113, § 37, provided for forfeiture, but the 7 & 8 Vict. c. 110, did not. Companies governed by this last Act usually possessed the right of forfeiting shares under their deed of settlement. A clause in the deed that

the shares of subscribers who would not execute it might be forfeited, was valid; *Stewart v. Anglo-Californian Co.*, 18 Q. B. 736; *Beresford's case*, 2 Mac. & G. 197, and 3 De G. & S. 175; *Baily's case*, 15 Jur. 29; but if there was no such clause, no forfeiture could be effected; *Barton's case*, 4 Drew. 535, and on appeal, 4 De G. & J. 46.

(i) The Acts of 1856-58 also left the subject of forfeiture to be dealt with by the regulations of each company.

Bk. III. Chap. 6. which notice of intention to forfeit was given. If the money arising from the sale of a forfeited share is more than sufficient to pay the arrears of calls with interest, and the expenses of sale, the surplus is to be paid to the defaulting shareholder; and if before a share is sold he pays what is due upon it and also the expenses, if any, incurred for the purpose of selling it, then he is entitled to have the share restored to him. The Act in question expressly declares that shares may be forfeited for non-payment of calls, whether those calls have been sued for or not. The right to forfeit and the right to sue may consequently both be exercised together: the remedies are cumulative, not alternative (*k*).

Forfeiting and suing for calls.

Cancellation of forfeited shares.

If the company has a special Act also incorporating the Companies Clauses Act, 1863, the shares when forfeited may be cancelled if they cannot be sold (*l*). But this can only be done by a general meeting, held at least two months after notice of the forfeiture (*m*), and the shares may be redeemed by payment of what is due in respect of them before they have been cancelled (*n*). Even such cancellation, however, does not release the shareholder from his liability to pay what may be due from him at the time of cancellation (*o*); although if he is afterwards sued in respect of what is so due, he must be credited with the value of his shares at that time (*p*). However, by the consent in writing of the shareholder and the sanction of a general meeting, shares which have been forfeited or on which money is due may be cancelled, so as to release the holder from all liabilities (*q*); but no money must be paid by the company for the cancellation of any share (*r*). New shares may be issued in lieu of cancelled shares (*s*).

Companies governed by the Act of 1862.

As to companies governed by the Companies Act, 1862, it is provided by Table A., that shares may be forfeited for

(*k*) *Great Northern Rail. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern Rail. Co.*, 1 Macq. 112. In *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *Giles v. Hutt*, 3 Ex. 18; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674, there was only an option to sue or to forfeit.

(*l*) 26 & 27 Vict. c. 118, § 4.

(*m*) *Ibid.*

(*n*) *Ib.* § 7.

(*o*) *Ib.* § 6.

(*p*) *Ib.* § 7.

(*q*) *Ib.* § 8.

(*r*) *Ib.* § 10.

(*s*) *Ib.* § 11.

non-payment of calls (No. 17) ; and even if power to forfeit is Bk. III. Chap. 6.
not given by the original articles, it may be given by special
resolution under § 50 of the Act (*t*). But a power to forfeit the
shares of a person if he sues the company or the directors is
brutum fulmen (*u*). In order legally to forfeit a share, under
the regulations of this Table, it is necessary, first to serve the
defaulting member, personally or by post (see Nos. 95—97),
with a notice (No. 17) (*x*) ; and secondly, to pass a resolution
of the directors forfeiting his shares (No. 19).

The notice must

1. Require the defaulting member to pay the call in arrear,
with interest and any expenses that may have accrued by
reason of its non-payment (No. 17) (*y*) ;

2. Name a further day on or before which the unpaid calls
with the interest and expenses are to be paid (No. 18) ;

3. State the place where the payment is to be made, such
place being either the company's registered office or some
other place at which the calls are usually made payable, *e.g.*,
at the company's bankers (No. 18) ;

4. State that, in the event of non-payment at or before the
time and at the place appointed, the shares in respect of which
the call was made will be liable to be forfeited (No. 18).

If the requisitions of this notice are not complied with, the
shares in respect of which it was given, may be forfeited, by a
resolution of the directors, at any time before payment of what
is due in respect of such shares (No. 19).

Any member whose shares have been forfeited is liable to pay
all calls due upon them at the time of their forfeiture (No. 21).

Forfeited shares are the property of the company, and may Forfeited shares.
be disposed of as the members at a general meeting think fit
(No. 20).

(*t*) See *Teasdale's case*, 9 Ch. 54,
and *Kelk's case*, and *Pahlen's case*,
9 Eq. 107. See, too, *Allen v. Gold
Reefs, &c., Ltd.* [1900], 1 Ch. 656,
where the power was extended by
being made applicable to fully paid
shares, and *ante*, pp. 461, 462.

(*u*) See *Hope v. International
Financial Society*, 4 Ch. D. 327.

(*x*) As to notices to deceased
members, see *Allen v. Gold Reefs,
&c., Ltd.* [1900], 1 Ch. 656, and *ante*,
p. 477, note (*c*).

(*y*) Interest can only be claimed
from the time when the call ought
to be paid, not from the date of the
call, *Johnson v. Lytle's Iron Agency*,
5 Ch. D. 687.

Bk. III. Chap. 6. In order to enable such shares to be reissued, and to protect a purchaser from the risk of having his title defeated by some irregularity in the forfeiture, it is provided that a statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share; and such declaration, and the receipt of the company for the price of such share, shall constitute a good title thereto (No. 22).

Votes by purchaser of forfeited shares.

Where a company's articles of association contained a provision that no member should be entitled to vote while any call was due in respect of his shares, and also a provision that a member whose shares had been forfeited should remain liable to pay calls due at the time of forfeiture, it was held upon the construction of the articles that a person who had purchased forfeited shares was not entitled to vote in respect of them so long as the calls due at the time of the forfeitures remained unpaid (z).

Exercise of the right to forfeit.

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness (a); it must be exercised by the proper parties, i.e., by directors properly appointed (b), and by the requisite number of them (c), and in the proper manner and for proper cause. The right must be exercised *bonâ fide* for the purpose for which it was conferred.

(z) *Randt Gold Mining Co. v. Brighton Rail. Co. v. Fairclough*, 2 *Wainwright* [1901], 1 Ch. 184. Man. & Gr. 674. Compare *Graham v. Van Diemen's Land Co.*, 1 H. & N. 541.

(a) See, as to the insufficiency of notices, &c., *New Chile Gold Mining Co.*, 45 Ch. D. 598, notice required by articles not sent; *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687, notice claimed too much interest; *Watson v. Eales*, 23 Beav. 294, notice of meeting too short and a mistake in the date; *Van Diemen's Land Co. v. Cockerell*, 1 C. B. N. S. 732, affirming *Cockerell v. Van Diemen's Land Co.*, 18 C. B. 454; *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *London and*

(b) *Garden Gully, &c., Co. v. M'Lister*, 1 App. Ca. 39, where the appointment of the directors was invalid; but see, as to mere irregularities in appointment, &c., of directors, *Dawson v. African Consolidated, &c., Co.* [1898], 1 Ch. 6, and *ante*, p. 415.

(c) *Bottomley's case*, 16 Ch. D. 681, where the number of directors was insufficient. Compare *Lyster's case*, 4 Eq. 233, *infra*, p. 728, note (k).

The power to forfeit is a trust, the execution of which will be Bk. III. Chap. 6. narrowly scanned by the court (*d*). It cannot, for example, be exercised surreptitiously, for the purpose of expelling a shareholder (*d*); nor by connivance, for the purpose of assisting him in getting rid of shares and retiring from the company, in fraud of the other shareholders. A Court will not sanction or recognise as valid a forfeiture made *malâ fide* for any such purpose.

The invalidity of a forfeiture made for the purpose of Forfeiture to enable a shareholder to retire. enabling a shareholder to retire when he is not entitled so to do, is well shown by the decision in *Richmond's case*, and *Painter's case* (*e*). There a director of a company proposed that he and his co-directors should take a number of shares as trustees for the company, and he signed the deed for 2,000 shares, and he was registered as the owner thereof. None of the other directors, however, followed his example. About two years afterwards he ceased to be a director; and a year after that, finding the company to be the reverse of prosperous, he desired to have his 2,000 shares cancelled. To enable the directors to cancel them, he suggested that a call should be made on his shares, and that they should be forfeited under the powers contained in the company's deed. This suggestion was acted on; a call was made, and his shares were forfeited for non-payment thereof. But it was held, that the directors had no power to release a shareholder from his obligations by enabling him to retire at the expense of the company; that the shares had not been *bonâ fide* forfeited for the benefit of the company, and that the forfeiture was therefore invalid.

If a company is being wound up voluntarily, it may nevertheless in general meeting appoint directors and sanction the Exercise of the right in a winding up.

(*d*) *Blisset v. Daniel*, 10 Ha. 483; *Esparto Trading Co.*, 12 Ch. D. 191; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Stubbs v. Lister*, 1 Y. & C. C. C. 81; *Allen v. Gold Reefs, &c., Ltd.* [1900], 1 Ch. 656. See, also, *Stewart's case*, 1 Ch. 511; and *Sweny v. Smith*, 7 Eq. 324, where the plaintiff had sent a cheque for his calls. *Hall's case*, 5 Ch. 707; *Gower's case*, 6 Eq. 77; *Spackman v. Evans*, L. R. 3 H. L. 171; *Stanhope's case*, 1 Ch. 161; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; and *ante*, pp. 712 and 715, 716.

(*e*) 4 K. & J. 305. See, also,

Bk. III. Chap. 6. exercise by them of the powers of forfeiture and sale contained in the articles of association for the purpose of enforcing calls made by the liquidator (*f*).

What amounts
to a forfeiture.

Clauses in deeds of settlement, &c., which declare that on non-payment of calls, &c., shares shall become absolutely forfeited, do not enable shareholders to get rid of their shares by refusing to pay their calls. Such clauses are inserted for the benefit of the company, and there is no forfeiture until a forfeiture is declared (*g*).

Moreover, a declared intention to forfeit not carried into effect (*h*), or not duly confirmed, is no forfeiture at all (*i*). Still, if there is power to forfeit, and a declared intention to forfeit, and the shares intended to be forfeited are treated by the company and the shareholder as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place (*k*). This doctrine, however, cannot apply where the forfeiture is altogether *ultra vires*; and there are cases in which, after the lapse of many years, persons whose shares had been forfeited in order to enable them to retire, were nevertheless held to be contributories (*l*).

Effect of for-
feiture.

The effect of the forfeiture of a share depends entirely upon whether the forfeiture is valid or not. If it is valid, the shareholder ceases, by the forfeiture of his shares, to be a member of the company, and although he may be liable to be sued for the calls (*m*) for the non-payment of which his shares have been forfeited, he is not liable to subsequent calls nor to be made a contributory as a present member on the winding up of the company (*n*). His position is that of a mere debtor to

(*f*) *Ladd's case* [1893], 3 Ch. 450.

(*g*) See *Moore v. Rawlins*, 6 C. B. N. S. 289.

(*h*) *Bigg's case*, 1 Eq. 309.

(*i*) See *Birmingham, Bristol, &c., Rail. Co. v. Locke*, 1 Q. B. 256; *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674.

(*k*) *Ex parte Woollaston*, 4 De G. & J. 437; *Knight's case*, 2 Ch. 321,

where a resolution to forfeit was presumed; *Lyster's case*, 4 Eq. 233, where the forfeiture was by two directors out of six. See, under the head Contributories, in Bk. IV., c. 1, § 13, B. (3).

(*l*) See *ante*, pp. 712 *et seq.*

(*m*) Interest on such calls was held not recoverable in *Stocken's case*, 5 Eq. 6, and 3 Ch. 412.

(*n*) See *infra*, under the head Contributories, in Bk. IV., c. 1,

the company (o). Hence, if the company is being wound up the calls can be recovered from him although the forfeiture took place more than a year before the commencement of the winding up (p). If he was induced to take the forfeited shares in the first instance by fraud, this, if he has done nothing to affirm his original contract, will afford a good defence to an action for the calls; and as on the forfeiture he ceased to be a member, he need not take any steps to rescind the contract (q). If the articles provide that an irregularity in forfeiture shall entitle the shareholder whose shares have been forfeited to damages, he may prove for such damages in the winding up in competition with the other creditors of the company (r).

But if a forfeiture is invalid, and if the company is not estopped from showing the invalidity (s), then the shareholder does not cease to be a member of the company, and he still remains liable to calls (t), and to be made a contributory on the winding up of the company (u). Whether the invalidity of a declaration of forfeiture affords a defence to an action by the injured shareholder against the company for damages occasioned by its wrongful act, is a question on which decisions conflict (x). But if a member has been in fact wrongfully expelled, and been damnified, it is not easy to see why an

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Invalid forfeiture.

Relief in such cases.

Damages.

§ 13. He may be a contributory as a past member, *Bridger's case*, 4 Ch. 266; *Creyke's case*, 5 Ch. 63.

(o) *Aaron's Reefs, Ltd. v. Twiss* [1896], A. C. 273; *Ladies' Dress Ass. v. Pulbrook* [1900], 2 Q. B. 377; *Randt Mining Co. v. Wainwright* [1901], 1 Ch. 184; see, too, in cases of transfer, *Ex parte Littledale*, 9 Ch. 257.

(p) *Ladies' Dress Ass. v. Pulbrook* [1900], 2 Q. B. 377.

(q) *Aaron's Reefs, Ltd. v. Twiss* [1896], A. C. 273.

(r) *New Chile Gold Mining Co.*, 45 Ch. D. 598. Probably the forfeiture was altogether invalid, but Stirling, J., under the circumstances, assumed it to be valid but irregular, see *ib.*, pp. 603 and 604, and Art. 36 at p. 600.

(s) See *ante*, pp. 65 *et seq.*

(t) See *Birmingham, Bristol, &c., Rail. Co. v. Locke*, 1 Q. B. 256; *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674.

(u) *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46; *Richmond's case*, and *Painter's case*, 4 K. & J. 305, and the cases cited, *ante*, p. 727, note (e).

(x) See *Catchpole v. Ambergate Rail. Co.*, 1 E. & B. 111, and compare the cases in the next note. If a company has no power to forfeit, a forfeiture cannot be imputed to it, and the action for damages ought to be against its directors, if it can be sustained at all.

Bk. III. Chap. 6. action should not lie. Be this, however, as it may, the invalidity of a forfeiture affords no reason why the Court should not interfere to protect or restore a shareholder to that position from which he is in fact excluded. In *Hart v. Clarke* (y), a shareholder in a cost-book mining company, whose shares had been improperly forfeited, was, after the lapse of a considerable length of time, restored to his rights as a shareholder; in *Norman v. Mitchell* (z), and in *Watson v. Eales* (a), an injunction was granted to restrain the carrying into effect of declarations of forfeiture recently made; and in *Stubbs v. Lister* (b), a forfeiture of shares was set aside on the ground that the directors who were bound to credit the shareholder with the utmost value of the shares, had credited him with a value set upon them by themselves, and which value was less than the current market price of shares in the company at the time the forfeiture was declared. In this case the shares were a security for money owing by their owner to the company, and were forfeited for non-payment of that money.

Restoration
to rights.

Stubbs v.
Lister.

Protection of
shareholder
pending
disputes

It may further be observed, that although a Court will not relieve a person whose shares have been duly forfeited (c), it will interfere to prevent a forfeiture pending a dispute between a company and a shareholder upon payment by him into court of what may be due from him in respect of the shares intended to be forfeited (d), and will take care that the shareholder has credit for whatever the shares may or, if properly sold, might have fetched (e).

The effect of acquiescence in a forfeiture, and of delay in seeking relief, will be examined hereafter. See Chap. IX., § 3 (f).

(y) 6 De G. M. & G. 232, and 6 H. L. C. 633. See, also, *Sweny v. Smith*, 7 Eq. 324, where the shareholder had tendered his call; *Garden Gully, &c., Co. v. M'Lister*, 1 App. Ca. 39; where the defence failed, and *Wood v. Wood*, L. R. 9 Ex. 190, where it succeeded. The former case does not appear to have been noticed.

(z) 5 De G. M. & G. 648.

(a) 23 Beav. 294.

(b) 1 Y. & C. C. 81.

(c) *Sparks v. Liverpool Waterworks Co.*, 13 Ves. 428.

(d) See *Naylor v. South Devon Rail. Co.*, 1 De G. & S. 32.

(e) See *Stubbs v. Lister*, 1 Y. & C. C. 81.

(f) The most recent decision on this point is *Rule v. Jewell*, 18 Ch. D. 660.

CHAPTER VII.

OF THE EFFECT OF THE DEATH OF A SHAREHOLDER.

THE consequences of the death of a member of a company will be most conveniently pointed out in the course of an examination of the position of the company, and of the executors of the deceased member—

1. As between themselves ;
2. As regards the creditors of the company ; and
3. As regards the separate creditors and legatees of the deceased.

SECTION I.—CONSEQUENCES AS REGARDS THE COMPANY AND THE EXECUTORS OF THE DECEASED.

The position of the executors or administrators of a deceased shareholder relatively to the company is as follows :—

1. They are entitled, as against the company, to the shares of the deceased, and to be paid by the company whatever is payable by it in respect of such shares at the time of his death ; and also whatever becomes payable in respect of those shares whilst they form part of his estate (*a*). Moreover, if the articles or regulations of the company provide that new shares shall be offered to the members in proportion to their existing shares, the executors of a deceased member are entitled so long as his name remains on the register to the benefit of the provision, and may claim an allotment accordingly (*aa*).

2. The assets of the deceased are liable to make good whatever is at the time of his decease payable by him to the company ; and also whatever afterwards becomes payable by his representatives by virtue of the contract into which he

(*a*) *Ante*, p. 164.

(*aa*) As in Table A. art. 27, *James v. Buena Ventura, &c., Syndicate* [1896], 1 Ch. 456 ; as to notices see *ib.*, and when death is known, *Allen*

v. Gold Reefs of West Africa [1900], 1 Ch. 656 ; when it is not known, *New Zealand Gold, &c., Co. v. Peacock* [1894], 1 Q. B. 622, and *ante*, p. 477, note (*c*).

Executors of shareholders.

Right to dividends, &c.

Liability to calls, &c.

Bk. III. Chap. 7.
Sect. 1.

entered. Consequently, if a person becomes a shareholder in a company and then dies, and afterwards, and whilst his shares are part of his estate, a call is made by the company on its shareholders, his assets will be liable to the payment of such call (b). Moreover a call, made by a company in pursuance of its Act, charter, or deed of settlement, constitutes a specialty debt (c); and all calls made under the winding-up provisions of the Companies Act, 1862, are also specialty debts (d). But specialty debts are no longer entitled to priority of payment over simple contract debts (e); and even before the law was altered in this respect, executors who paid the simple contract debts of their testator before a call was made, were allowed those payments as against the company seeking to make them liable for a *devastavit* (f); and no part of the testator's assets could, as against his simple contract creditors, be set apart for the payment of calls which had not been made (g). If the deceased's estate is insolvent, the company may prove in the administration of his estate for the estimated value of the liability to future calls on the shares standing in his name (h).

Liability to be
made contribu-
tories.

3. It follows from the foregoing observations that, when a company is being wound up, the executors of a deceased shareholder are liable to be made contributories as executors in respect of his shares so long as they remain untransferred.

(b) See, in equity, *Fyler v. Fyler*, 2 Ra. Ca. 813; *Blakeley's case*, 13 Beav. 133, and 3 Mac. & G. 726; *Heward v. Wheatley*, 3 De G. M. & G. 628, and at law, *Wills v. Murray*, 4 Ex. 843. Compare *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. 801.

(c) *Cork and Bandon Rail. Co. v. Goode*, 13 C. B. 826. In *Morris v. Sadlier*, Ir. L. R. 6 Eq. 580, a covenant by a deceased shareholder with an officer of the company to pay what should be demanded of him, was held not to create a specialty debt in respect of monies due from his estate, but not demanded in his lifetime. Calls made under a Colonial Act are simple contract debts only, see *Welland Rail.*

Co. v. Blake, 6 H. & N. 415.

(d) The Companies Act, 1862, § 16. It was not so under the older winding-up Acts, see *Robinson's Executors' case*, 6 De G. M. & G. 572. All monies due to the company under its regulations are specialty debts, see § 16 and *Lion Insurance Co. v. Tucker*, 12 Q. B. D. 176.

(e) 32 & 33 Vict. c. 46.

(f) *Henderson v. Gilchrist*, 17 Jur. 570.

(g) *Wentworth v. Chevell*, 3 Jur. N. S. 805. As to the legatees and next of kin, see *infra*, p. 740.

(h) *In re McMahon* [1900], 1 Ch. 173, and Judicature Act, 1875, s. 10, and see *infra*, pp. 752 *et seq.*, in case of bankruptcy.

From this again it follows, that the executors of a deceased shareholder are entitled to petition for an order to wind up the company, although they may not be themselves shareholders therein. This subject will be alluded to hereafter (i).

Bk. III. Chap. 7.
Sect. 1.

4. In most companies, executors have, as between themselves and the company in which their testator was a shareholder, a right to become shareholders in his stead (k). But if an executor does become a shareholder, his liability, as well to the company as to its creditors, is a personal liability; and such liability is in no way qualified or limited by the circumstance that as between himself and those who are beneficially entitled to the testator's assets, the executor is not the owner of the shares standing in his name (l). Executors, therefore, should not become shareholders if they can avoid doing so; and generally it will be found that they can transfer their testator's shares without first becoming shareholders themselves; and where this is the case, an assent by them to become shareholders will not be presumed, even if their names have been put on the company's register (m). Whether, however, executors can or cannot dispose of their testator's shares without themselves becoming shareholders, and the manner in which it is to be done, depend, in each case, upon the constitution of the company in which the shares are held.

Necessity for
executors to
become share-
holders.

By the Companies Act, 1862, provision is expressly made for transfers by executors, although they may not themselves be members (n).

The transfer by executors of shares in companies, governed by the Companies Clauses Consolidation Act, is also specially provided for (o); but by this Act the executors must apparently

(i) See *infra*, Bk. IV. c. 1, § 3.

(k) A clause in the articles of association giving the company power to decline to register a transfer does not apply as between a testator and his executor. See *Bentham Mills Spinning Co.*, 11 Ch. D. 900; compare *Ex parte Harrison*, 26 Ch. D. 522, and 28 Ch. D. 363.

(l) See *Duff's Executor's case*, 32 Ch. D. 301; *Spence's case*, 17 Beav.

203; *Fenwick's case*, 1 De G. & S. 557; *Armstrong v. Burnet*, 20 Beav. 424.

(m) See *Buchan's case*, 4 App. Ca. 549, 583, where the executors were on the register.

(n) 25 & 26 Vict. c. 89, § 24, and see Table A., Nos. 12—16, and *ante*, p. 650. The Table B. to the Companies Act, 1856, contained similar provisions.

(o) 8 & 9 Vict. c. 16, §§ 18, 19, 20.

Bk. III. Chap. 7. be themselves registered as shareholders before they can
Sect. 1. transfer (p).

Transfers by
executors on
register.

If shares have been registered in the names of the executors, a transfer, to be valid, must be executed by all the executors on the register (q).

Shares held by
several persons
jointly.

When a share in a company is held by several persons jointly, and one of them dies, the legal title to that share devolves on the survivors, whatever may be the case as to the equitable title (r). If the holders are partners, and the share is partnership property, the equitable interest of the deceased will not survive; but if the holders are not partners, the question of survivorship or non-survivorship will depend upon those principles which would be applicable under similar circumstances to other property; and the fact that the regulations of the company contain a clause to the effect that no benefit of survivorship shall take place amongst the shareholders will be of little, if any, consequence. For example: shares purchased by A., in the names of himself and B., *prima facie* belong in equity to A.; but if A. dies before B., the legal interest in them devolves on B.; and if the evidence rebuts the presumption which *prima facie* exists in A.'s favour, B. will be entitled to the shares both at law and in equity, although the company's deed may contain such a clause as that just mentioned (s). If, however, B. is only a trustee for A., and A. dies, and then B. dies, and the company is wound up, B.'s executor will be liable to be put upon the list of contributories, and he will be entitled to indemnity out of A.'s estate, and to sue for such indemnity before being actually settled on the list (t).

At common law a corporation cannot hold property jointly with an individual; on this ground the Court refused to compel the Bank of England to register stock in the joint

(p) Compare §§ 3, 14, 18; but see case in next note.

(q) *Barton v. Lond. & N.-W. Rail. Co.*, 24 Q. B. D. 77.

(r) See acc. *Hill's case*, 20 Eq. 595, where the survivor alone was put on the list of contributories. Qu. whether the executors can be

put on as past members.

(s) *Garrick v. Taylor*, 4 De G. F. & J. 159, affirming S. C. 29 Beav. 79.

(t) *Hobbs v. Wayet*, 36 Ch. D. 256. See generally as to trustee's right of indemnity in respect of shares, *Haroon v. Belilios* [1901], A. C. 118.

names of an incorporated company and an individual (*u*). But the law in this respect has been recently altered by statute (*v*). Bk. III. Chap. 7.
Sect. 2.

If an English company transfers shares to the executors of a foreigner who have not taken out probate or letters of administration in this country, the company renders itself liable as executor *de son tort* for the duty and penalties (*x*). Probate duty.

SECTION II.—CONSEQUENCES OF DEATH AS REGARDS THE CREDITORS OF THE COMPANY.

With respect to the right of a creditor of a company to proceed against the executors of a deceased shareholder, a distinction must be taken between unincorporated and incorporated companies; for whilst the assets of a deceased shareholder in an unincorporated company are *primâ facie* liable in equity (although not at law) to the debts of the company contracted before his decease (*y*), the assets of a deceased member of a body corporate are, *primâ facie*, not liable to the payment of the debts thereof either at law or in equity. But as regards both classes of companies, the position of executors in fact depends less on general principles than on particular statutes, the provisions of which must therefore not be overlooked. Thus, although banking companies governed by 7 Geo. 4, c. 46, are not corporate bodies, and although creditors of such companies are, it seems, entitled to obtain payment of their debts out of the assets of a deceased shareholder, still the creditors' rights are so far modified by the Acts in question, that, whether they are creditors by specialty or by simple contract, the lapse of three years after the death of a shareholder bars their claims against his executors (*z*); and even within that period the executors are only liable to pay such debts as the surviving shareholders are unable to discharge (*a*). Several cases are

(*u*) *Law Guarantee, &c., Socy. v. A.-G. v. New York Breweries Co. Bank of England*, 24 Q. B. D. 406. [1898], 2 Q. B. 205.

(*v*) 62 & 63 Vict. c. 20, and as to stock transferable at the Bank of England, see 55 & 56 Vict. c. 39, § 6. (*y*) See Partn., 610 *et seq.* (*z*) See *Barker v. Buttriss*, 7 Beav. 134.

(*x*) *New York Breweries Co. v. A.-G.* [1899], A. C. 62, affirming (*a*) *Heward v. Wheatley, Ex parte Wilson*, 5 De G. & S. 552. Compare *Re Walton's Estate*, 23 Beav. 480.

Liability of
estate of de-
ceased share-
holder.

Bk. III. Chap. 7. also to be found in which executors, not being themselves
Sect. 3. shareholders, have been held not liable to creditors (*b*). Similar observations apply to actions for calls.

The liability of executors to be proceeded against by *sci. fa.* or its modern substitute has been already noticed (Book II., c. 7, § 3) : their liabilities as contributories will be referred to hereafter in Book IV., c. 1, § 13.

SECTION III.—AS REGARDS THE SEPARATE CREDITORS AND LEGATEES OF THE DECEASED.

Legacies of
shares in com-
panies.

Shares in companies are property for all purposes of administration. They are assets for the payment of debts ; they can be disposed of by will (*c*) ; and if not disposed of they must, as a rule (*cc*), be dealt with like other personal estate, and be distributed amongst the statutory next-of-kin of their deceased owner. They are legal and not equitable assets (*d*) ; they pass under a bequest of personal estate (*e*) ; and if the certificates are kept at a bank the shares will pass under a bequest of property at that bank (*f*).

Shares, however, will not ordinarily pass under a bequest of monies, bonds, or securities (*g*). But under special circumstances they will pass even under a bequest of money, as in *Knight v. Knight* (*h*), where share certificates were in an envelope indorsed “to be considered as money and given to

(*b*) *Ness v. Armstrong*, 4 Ex. 21, where the executors had received dividends ; *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469, where the deceased's name was kept on the register of shareholders ; *Poole v. Knott*, 7 W. R. 527, where the deceased had died before the creditor had obtained judgment against the company. The doubt expressed in *Ricketts v. Bowhay*, 3 C. B. 889, is removed by the decision in *Ness v. Armstrong*, 4 Ex. 21 ; and the case of *Ness v. Bertram*, 4 Ex. 191, turned entirely on a point of pleading.

(*c*) *Semble*, a *donatio mortis causi* of shares cannot be made by handing over the certificates. *Ward v. Turner*, 2 Ves. Sen. 431 ; *Moore v. Moore*, 18 Eq. 474. See, too, *Solicitor to Treasury v. Lewis* [1900], 2 Ch. 812.

(*cc*) See *ante*, p. 630.

(*d*) *Cook v. Gregson*, 3 Drew. 547.

(*e*) *Cadman v. Cadman*, 13 Eq. 470, canal shares.

(*f*) *Desinge v. Beare*, 37 Ch. D. 481.

(*g*) *Hudleston v. Gouldsbury*, 10 Beav. 547 ; *Ogle v. Knipe*, 8 Eq. 434 ; *Collins v. Collins*, 12 Eq. 455.

(*h*) 2 Giff. 616.

A. B." A bequest of shares will ordinarily pass stock (i), but not debentures (k) or debenture stock (l), though if the testator never held any shares in the company mentioned in the gift, debentures may pass under a bequest of shares in that company (m). Bk. III. Chap. 7.
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Where a person entitled to various kinds of shares in a company bequeaths some of them, and there is nothing in the will to show that the testator intended to bequeath any particular shares, the legatee can select which he pleases (n). But if the will shows that he did intend to bequeath some particular shares, and there is no means of ascertaining either from the will or the surrounding circumstances which shares he intended, the bequest will fail for uncertainty (o).

A legacy of shares in a company is not necessarily adeemed by the conversion of such shares into stock (p), or into annuities (q); nor by the amalgamation of that company with another (r). But a bequest of shares in an unincorporated banking company governed by 7 Geo. 4, c. 46, was held to fail by reason of the subsequent registration of the company with limited liability, and with an altered capital differently divided (s). Ademption.

A legatee of shares may, of course, decline to accept them, and he may do so although he accepts other property under the same will (t); unless there is only one gift, in which case he must accept or decline the whole (u).

(i) *Morrice v. Aylmer*, 10 Ch. 148, and L. R. 7 H. L. 717; *Trinder v. Trinder*, 1 Eq. 695.

(k) *Dillon v. Arkins*, 17 L. R. Ir. 636.

(l) *Re Bodman* [1891], 3 Ch. 135.

(m) *Re Weeding* [1896], 2 Ch. 365. So, too, debentures have been held to pass under a bequest of "debenture stock or shares" in a particular company; *Re Nottage*, [1895], 2 Ch. 649.

(n) *Millard v. Bailey*, 1 Eq. 378.

(o) *Re Cheadle* [1900], 2 Ch. 620, where the surrounding circumstances showed which shares the testator intended to bequeath.

(p) *Oakes v. Oakes*, 9 Ha. 666.

See on this case the cases in note (i); and compare *Re Gibson*, 2 Eq. 669; *Re Lane*, 14 Ch. D. 856, a case of debentures.

(q) *Bronsdon v. Winter*, 1 Amb. 57; *Partridge v. Partridge*, 9 Mod. 269; Cas. t. Tal. 226.

(r) See *Phillips v. Turner*, 17 Beav. 194.

(s) *Dresser v. Gray*, 36 Ch. D. 205. N.B. The head-note misdescribes the company.

(t) *Long v. Kent*, 6 N. R. 354.

(u) See *Guthrie v. Walrond*, 22 Ch. D. 573, and the cases there cited.

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Absolute
legacies.

Where a share in a company is bequeathed to a person absolutely, the executors should transfer it to the legatee as soon as possible, in order that the liability of the testator's estate in respect of it may be put an end to (x). If the legatee is not *sui juris*, and the share cannot be transferred into his name, the position of the executors becomes embarrassing, unless the share is a fully paid up share in a limited company. If, however, they do nothing with the share, but simply take the dividends as executors, they will not render themselves personally liable to creditors (y); nor will they be liable to be made contributories, otherwise than in their representative capacity (z). But it may happen that, unless the executors transfer the shares into the names of themselves or some other persons, the shares will become forfeitable; and in that case (the legatee of the share being still supposed to be not *sui juris*) the executors should, for their own protection, apply for the direction of the Court.

Legacies for
life.

Where shares are bequeathed to one person for life with remainder to another, they ought nevertheless to be sold unless it is clearly the testator's intention that they shall be retained *in specie* (a). If they are intended to be enjoyed *in specie*, the position of the executors again becomes embarrassing, unless they are fully paid up shares in a limited company: for if they transfer the shares into the name of the tenant for life, there is nothing to prevent him from selling them for his own use; and in case of a sale of the shares by him, the remainderman would naturally seek to make the executors responsible for their loss. If, on the other hand, the executors procure the shares to be transferred into their own names as trustees for the legatees, a personal liability in respect of the shares will be incurred by the executors, and that liability will not be limited by the amount of the assets of the testator. Unless, therefore, the executors can retain the shares without transferring them, they should, for their own safety, apply for the direction of the Court.

(x) See *Keene's Executors' case*, 3 De G. M. & G. 272.

(y) *Ness v. Armstrong*, 4 Ex. 21.

(z) This subject will be adverted to hereafter when treating of Contributories, Bk. IV., c. 1, § 13.

(a) See *Blann v. Bell*, 2 De G. M. & G. 775; *Thornton v. Ellis*, 15 Beav. 193; *Crouce v. Crisford*, 17 ib. 507; *Wightwick v. Lord*, 6 H. L. C. 217.

Where shares are bequeathed to one person for life, with remainder to another, and are transferred into the name of the tenant for life, they will, on his death, be transferable into the name of the remainderman without further payment of probate duty (b). Such shares, in fact, form no part of the tenant for life's estate, and are covered by the duty payable in respect of the estate of the original testator.

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Probate duty.

Where shares are bequeathed, not specifically, to one person for life, and after his death to another, the money yielded by them before sale will not necessarily belong to the tenant for life; for, according to the case of *Dimes v. Scott* (c), the tenant for life is only entitled to the income which would have been obtained if the shares had been sold and the produce invested in consols, at the end of a year from the testator's death: the income thus ascertained being, however, paid from the date of the death. This rule applies where the testator's residuary estate consists of shares when he dies. But it has been held that the rule does not apply where the executors themselves make an unauthorised investment; and that in such a case the tenant for life is entitled to the income actually yielded by the investment, and the remainderman is not entitled to more than a restoration of the original capital (d).

Income before
sale.

Dimes v. Scott.

When the legacy is specific, the rule in *Dimes v. Scott* does not apply, the legatee taking whatever the shares may yield (e). So where the shares, although not specifically bequeathed, are directed by the will not to be sold for a certain time, what they yield during that time will belong to the tenant for life (f).

It appears to be now settled, that when shares are specifically bequeathed, and the will contains no special directions to the contrary, all calls made upon the shares in the testator's lifetime must be borne by his general personal estate; whilst

Payment of
calls.

(b) *Hennell v. Strong*, 25 L. J. Ch. 407.

(c) 4 Russ. 195, and see *Fearn v. Young*, 9 Ves. 549.

(d) See *Stroud v. Gwyer*, 28 Beav. 130.

(e) *Infra*.

(f) See *Green v. Britten*, 1 De G.

J. & Sm. 649. Where the sale is postponed by the Court for the benefit of infants, see *Lambert v. Rendle*, 3 N. R. 247. See generally, on this subject, the notes to *Hove v. Earl of Dartmouth*, 1 White & Tudor, Leading Cases in Equity, 7th ed., pp. 68 *et seq.*

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all those made after his death must be borne by the legatee taking the shares (*g*). There are, indeed, cases which show that calls made after the testator's death are payable out of his general estate, and not by the specific legatee (*h*); but these cases are not to be relied upon, except where the payment of the calls would have been a condition precedent to the completion of the testator's own title to the shares if he himself had lived (*i*), and the calls are made before the specific legatee is, by the terms of the will, to have the shares (*k*).

Tenant for life.

If a tenant for life of shares makes advances to the trustees in whose names the shares stand to enable them to pay calls in respect of the shares, he is entitled to a lien on the shares for the amount of such advances and interest (*l*).

Indemnity fund
to meet calls.

Where shares are specifically bequeathed, and calls upon them are payable out of a testator's residuary estate, a fund ought to be set apart for the indemnity of the specific legatee (*m*); but, where the assets of the deceased are insufficient for the payment of his debts, no fund to meet future calls ought to be set apart to the prejudice of even simple contract creditors (*n*).

A legatee of shares on which the company has a general lien, is not liable to contribute with the devisee of land mortgaged to the company by the testator towards the payment off of the mortgage debt (*o*).

Rights to
profits, &c.

A specific legatee of a share in a company is entitled to all

(*g*) See *Re Boz*, 1 Hem. & M. 552, and *Day v. Day*, 1 Dr. & Sm. 261, where all the previous cases are reviewed. See also, *Bevan v. Waterhouse*, 3 Ch. D. 752, as to a direction to pay calls out of income, and not out of capital.

(*h*) *Blount v. Hipkins*, 7 Sim. 51; *Clive v. Clive*, Kay, 600; *Jacques v. Chambers*, 4 Ra. Ca. 499, correcting S. C. 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367.

(*i*) As to this qualification, see *Armstrong v. Burnet*, 20 Beav. 424; *Addams v. Ferick*, 26 ib. 384; and *Day v. Day*, *ubi supra*.

(*k*) *Re Boz*, 1 Hem. & M. 552,

where the testator's residuary estate, including the shares, was bequeathed to A. for life, and after his death the shares were specifically bequeathed to B., and the calls were made in A.'s lifetime.

(*l*) *Todd v. Moorhouse*, 19 Eq. 69; *Rowley v. Unwin*, 2 K. & J. 138.

(*m*) *Jacques v. Chambers*, 4 Ra. Ca. 499.

(*n*) *Wentworth v. Chevell*, 3 Jur. N. S. 805. See, too, *Read v. Blunt*, 5 Sim. 567, and compare *Atkinson v. Grey*, 1 Sm. & G. 577. See *ante*, p. 732.

(*o*) See *Dunlop v. Dunlop*, 21 Ch. D. 583, noticed, *ante*, p. 636.

ordinary dividends declared after the testator's death (*p*), unless although declared after his death they were earned and ought to have been declared before (*q*). But dividends declared before a testator's death (*r*), or declared afterwards when they were earned and ought to have been declared before (*s*), *primâ facie* form part of his general estate, and do not pass to the specific legatee of the share : and the same rule applies to dividends declared before his death, but the actual payment of which is postponed until afterwards (*t*). Losses must not be thrown on capital so as to benefit a tenant for life at the expense of the remainderman (*u*).

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Sect. 8.

Few questions have given rise to more difficulty and diversity of opinion than the proper mode of treating bonuses and other extraordinary payments made in respect of shares held for life. At one time it was considered that all payments in respect of accumulations of profits were to be treated as between tenant for life and remaindermen as capital and not as income ; and it was not by any means clear that the mode in which the company treated them afforded the true solution of the difficulty (*x*).

Bonuses, &c.

This subject, however, has been at last thoroughly discussed in the House of Lords in *Bouch v. Sproule* (*y*), where all the

Bouch v. Sproule.

(*p*) *Jacques v. Chambers*, 2 Coll. 435 ; *Wright v. Warren*, 4 De G. & S. 367 ; *Browne v. Collins*, 12 Eq. 586 ; *Ibbotson v. Elam*, 1 Eq. 188.

(*q*) *Browne v. Collins*, 12 Eq. 586. But see *Ibbotson v. Elam*, 1 Eq. 188.

(*r*) See the next two notes.

(*s*) *Browne v. Collins*, 12 Eq. 586.

(*t*) *De Gendre v. Kent*, 4 Eq. 283 ; *Lock v. Venables*, 27 Beav. 598 ; *Wright v. Tuckett*, 1 J. & H. 266. Compare *Clive v. Clive*, Kay, 600, which turned on the special wording of the company's deed of settlement.

(*u*) See *Upton v. Brown*, 26 Ch. D. 588 ; *Gow v. Forster*, ib. 672.

(*x*) Compare *I. Hopkins' Trust*, 18 Eq. 696 ; *Plumbe v. Neild*, 6 Jur. N. S. 529 ; *Price v. Anderson*, 15 Sim. 473 ; *Preston v. Melville*, 16 ib.

163 ; and *Barclay v. Wainwright*, 14 Ves. 66, in which the payments were held to be income, with *II. Straker v. Wilson*, 6 Ch. 503 ; *Barton's Trust*, 5 Eq. 238 ; *Ward v. Coombe*, 7 Sim. 634 ; *Witts v. Steere*, 13 Ves. 363 ; *Paris v. Paris*, 10 Ves. 185 ; and *Brander v. Brander*, 4 Ves. 800, in which the payments were held to be capital. See, also, *Cuming v. Boswell*, 2 Jur. N. S. 1005, where the House of Lords held, that upon the true construction of a Scotch deed, bonuses belonged to an infant's estate, and not to the person who, on his death under 21, became entitled to the stocks which yielded them.

(*y*) 12 App. Ca. 385, reversing S. C. 29 Ch. D. 635.

Bk. III Chap. 7. previous authorities were reviewed. The principles there laid down are as follows, viz. :—
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1. If a company has no power to increase its capital, but accumulates profits, uses them as capital, and afterwards divides them amongst the shareholders, the amount payable in respect of shares held for life must be treated as capital (z).

2. If a company can lawfully increase its capital, and it does so by capitalising and distributing its accumulated profits, then what is distributed in respect of shares held for life must be treated as capital, whether what is distributed is cash or new shares (a).

3. If a company having power to treat accumulated profits as an increase of capital, or otherwise, divides accumulated profits amongst its shareholders as profits (or without capitalising them or treating them as capital) what is distributed in respect of shares held for life will belong to the tenant for life as income (b).

It had been previously decided that if a company having power to increase its capital chooses not to divide its profits as income, but to capitalise them, the sum payable to a legatee of shares for life must be treated by him as capital (c).

Maclaren v.
Stainton.

On the other hand, if, as in *Maclaren v. Stainton* (d), a bonus arising from money paid to a company under a compromise with one of its own shareholders is divided as income, the sum payable will belong to a specific legatee of shares, and not to the residuary legatee, and to a legatee of shares for life and not to the remainderman.

(z) *Irving v. Houstoun*, 4 Paton Sc. App. 521, a former decision of the House of Lords, and one which has often been felt to create a difficulty.

(a) This was the point decided in *Bouch v. Sproule*. Compare *Re Malam* [1894], 3 Ch. 578. As to capitalising profits, see, also, *Bridge-water Navigation Co.* [1891], 2 Ch. 317.

(b) This point did not arise in *Bouch v. Sproule*, but is warranted by it. See *Re Alsbury*, 45 Ch. D. 237; *Re Malam* [1894], 3 Ch. 578.

(c) *Barton's Trust*, 5 Eq. 238. See, also, *Straker v. Wilson*, 6 Ch. 503.

(d) 3 De G. F. & J. 202, reversing 27 Beav. 460.

If the company, when distributing accumulated profits amongst its shareholders as profits, gives the shareholders an option of taking such profits in shares instead of in cash, a tenant for life who accepts shares is only entitled to so much of their value as represents the profits applied in their purchase; if the shares are subsequently sold, and realise more than the amount of profits so applied, the surplus is capital (e).

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Profits distributed in shares.

If on the winding up of a company the surplus assets of the company are more than sufficient to repay to each shareholder the nominal value of his share, the excess, though in one sense profit, is, as between tenant for life and remainderman, capital and not income (f).

Surplus in winding up.

Where part of the profits accruing during the life of the tenant for life are capitalised by the company, he has no right to have the loss of income, which he thereby sustains, made good by the remainderman (g).

Loss of income by tenant for life.

Interest on a debt accrues *de die in diem*, and is apportionable at common law; and profits and dividends, including bonuses (h) of public companies (i), are now apportionable under the Act 33 & 34 Vict. c. 35, which applies to all cases arising between a tenant for life and remainderman after the Act came into operation, although the will under which the parties claim came into operation before that time (k). If, therefore, a testator bequeaths debentures to one person for life, and afterwards to another, and dies shortly before the current interest on the debentures is payable, so much only of that interest as accrued after the death of the testator will belong to the tenant for life (l). And now if there is

Apportionment of interest and dividends.

(e) *Re Malam* [1894], 3 Ch. 578. In this case the original shares were in the names of trustees, and they exercised the option, but *semble* this is immaterial.

(f) *Re Armitage* [1893], 3 Ch. 337. As to the nature of such surplus as between the shareholders *inter se*, see *Bridgewater Navigation Co.* [1891], 2 Ch. 317, and *infra*, Bk. IV., c. 1, § 16.

(g) See *Stroud v. Gwyer*, 28 Beav. 130.

(h) *Carr v. Griffiths*, 12 Ch. D. 655.

(i) As to what are public companies see *ante*, p. 10.

(k) *Lawrence v. Lawrence*, 26 Ch. D. 795.

(l) See *Rogers' Trusts*, 1 Dr. & Sm. 338.

Bk. III. Chap. 7. a specific bequest of shares in a company, and the testator dies a few days before a dividend upon them is declared, there will be a similar apportionment of the dividend (*m*), unless such apportionment is excluded by the terms of the will (*n*).

Price realised
by sale of shares
is *corpus*.

Other circumstances being the same, the price of shares in dividend-paying companies naturally rises as a dividend day approaches; in fact, the price includes a proportionate part of the accruing dividend; nevertheless, as between a tenant for life and a remainderman the price realised by a sale of shares is all treated as *corpus*, without reference to the time when a sale is made (*o*): and the statute 33 & 34 Vict. c. 35, has not altered the law in this respect (*p*).

Liability of
executors for
not selling
shares.

Where shares are bequeathed to executors upon trust for sale as soon as conveniently may be after the testator's death, they should sell them within a year after his death: and in a case where they were kept unsold for many years and the company was ultimately wound up, the estate of a deceased executor who survived the testator only thirteen months was held liable for the loss sustained by not having sold them within the year (*q*). Where, however, the executors honestly in the exercise of their own judgment postpone the sale for a short time longer than a year, they will not be compelled to

(*m*) *Re Lysaght* [1898], 1 Ch. 115; *Carr v. Griffiths*, 12 Ch. D. 655; *Pollock v. Pollock*, 18 Eq. 329, correcting *Whitehead v. Whitehead*, 16 Eq. 528. In *Jones v. Ogle*, 14 Eq. 419, affirmed on appeal, 8 Ch. 192, there was no apportionment, but there not only the shares but the dividends on them were specifically bequeathed. Compare *Re Clarke*, 18 Ch. D. 160. See, before the Act, *Maxwell's Trusts*, 1 Hem. & M. 610; *Bates v. Mackinley*, 31 Beav. 280; *Clive v. Clive*, Kay, 600; *Hartley v. Allen*, 4 Jur. N. S. 500.

(*n*) *Re Lysaght* [1898], 1 Ch. 115.

(*o*) *Scholefield v. Redfern*, 2 Dr. & Sm. 182. See, also, *Freman v. Whitbread*, 1 Eq. 266.

(*p*) *Bulkeley v. Stephens* [1896], 2 Ch. 241, where, however, under special circumstances, though not under the Act, the representatives of the tenant for life, were held entitled to a sum equal to the apportioned part of the dividend.

(*q*) *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 232. See, also, *The Heirs Hiddingh v. De Villiers Denysen*, 12 App. Ca. 624, an appeal from the Cape, where executors who had delayed the conversion of shares were held liable for their value ascertained at a reasonable time after the death of the testator, which in that case was fixed at six months.

make good loss arising from the postponement (r) ; and if a testator gives his executors an absolute discretion to postpone the sale and conversion they will not, in the absence of *mala fides*, be held liable for any loss sustained by non-conversion, even of shares in an unlimited company (s).

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If a testator's estate consists of a business or shares in a mercantile company, and it becomes necessary or highly desirable for the benefit of the estate to sell such business to a limited company for shares or debentures of the company, or to reconstruct the company of which the testator was a shareholder, and the trustees of his will have no power to carry out such a transaction, the Court can and in a proper case will authorise them to do so, and will, if necessary, give special directions as to the retention or sale of the shares and debentures (t).

Power of Court
to sanction a sale
of the testator's
business to a
company for
shares, &c.

(r) *Marsden v. Kent*, 5 Ch. D. 598.

(s) *Re Norrington*, 13 Ch. D. 654.

(t) *Re New*, *Re Leavers*, and *Re Morley*, [1901] 2 Ch. 535 ; and the comments thereon in the earlier cases, *Re Crawshaw*, W. N. (1888),

p. 246 and 251, and *Re Morrison*, [1901] 1 Ch. 701 ; and for special directions as to the sale or retention of shares, see, too, *Re Hargreaves*, [1901], 2 Ch. 547, note.

CHAPTER VIII.

OF THE EFFECT OF THE BANKRUPTCY OF A SHAREHOLDER.

Bk. III. Ch. p. 8.

THE law of bankruptcy so far as it relates to partners will be found in the volume on partnership. So much of it as relates to shareholders and is peculiar to them is alone referred to in the present treatise.

Married
women.

Every shareholder who is *sui juris*, whether a trader or not, is liable to become bankrupt (a). A married woman holding shares for her separate use can however only become bankrupt if she carries on a trade separately from her husband, and she is only subject to the bankrupt laws in respect of her separate estate (b). Whether holding shares in a trading company is carrying on trade within the meaning of the Married Women's Property Act, 1882 (c), has not yet been decided. But merely holding shares in an incorporated company can hardly be carrying on a trade (d). Whether holding shares in an unincorporated company can amount to "carrying on trade separately from her husband" is more doubtful; but unless a married woman not only holds shares in a company, but also takes an active part in carrying on its business separately from

(a) See as to infants and lunatics, Partn., p. 64¹, note (n).

(b) 45 & 46 Vict. c. 75, § 1, cl. 5. *Ex parte Coulson*, 20 Q. B. D. 249; and *Ex parte the Debtor* [1898], 2 Q. B. 576, where the woman married after the presentation of the petition. As to the effect of a restraint on anticipation where a married woman is declared bankrupt, see *Wheeler's Settlement Trusts* [1899], 2 Ch. 717. A bankruptcy notice cannot be issued against her in respect of a judgment against her in the form approved in *Scott v. Morley*, 20 Q. B. D. 120, see *Ex parte Lester & Co.* [1893], 2 Q. B.

113, even after her husband's death, see *Ex parte Levene* [1895], 1 Q. B. 328; nor in respect of a judgment against her in a firm name, see *Ex parte Frances Handford*, [1899] 1 Q. B. 566. As to when a woman who has carried on a business separately from her husband ceases to do so, see *Ex parte Soan and Morley* [1896], 2 Q. B. 407; and *Re Worsley* [1901], 1 K. B. 309.

(c) *Ib.*

(d) In this case the trade is carried on by the corporation, not by the members of it.

her husband, she cannot, it is conceived, be made bankrupt Bk. III. Chap. 8.
under the clause in question. The older authorities, to the effect that persons holding shares in trading companies were themselves traders within the meaning of the old Bankruptcy Acts (e), have little bearing on this question.

Any company empowered to sue and be sued by a public officer (f) or a corporation (g), e.g., a registered company (h), may be the petitioning creditor; and a company being wound up under the Companies Act, 1862, can obtain an adjudication against one of its own shareholders in respect of calls (i).

An incorporated company can act in bankruptcy by any of its officers authorised so to do under its corporate seal (k); and an unincorporated company having no public officer can act by any of its members authorised so to act (l).

It is presumed that a company empowered to sue and be sued by a public officer can act by him although there is no general enactment or rule expressly to this effect (m).

The purser of a cost-book mining company cannot present a bankruptcy petition in his own name against a shareholder (n).

The petitioning creditor's debt must amount to 50*l.*, payable immediately or at some certain future time (o). A call made under the winding-up provisions of the Companies Act, 1862, is expressly declared to be a debt accruing when the call is made (p).

(e) *Smith v. Cannan*, 2 E. & B. 35, and the cases there referred to. See as to mining companies, *Ex parte Schomberg*, 10 Ch. 172.

(f) Bank. Rules, 1886, r. 258. As to the mode of describing him, see *Ex parte Torkington*, 9 Ch. 298.

(g) 46 & 47 Vict. c. 52, § 168, "Person." *Ex parte Collins*, De Gex, 381; *Ex parte Sneyds*, 1 Moll. 261.

(h) *Re Calthrop*, 3 Ch. 252.

(i) See 25 & 26 Vict. c. 89, §§ 75, 95; *Ex parte Winterbottom*, 18 Q. B. D. 446; *Ex parte Hall*, Mon. & Ch. 365; *Ex parte Calthrop*, 3 Ch. 252. Under the former Acts the official manager could not be a petitioner; *Williams v. Harding*,

L. R. 1 H. L. 9.

(k) *Ib.*, § 148, *Tomkins & Co.* [1901], 1 Q. B. 476.

(l) See *ib.* and Bank. Rules, 1886, r. 258. The section uses the word firm, and the statement in the text is supposed to be the meaning.

(m) See § 148 and rule 258; *Re Caldecott*, 2 M. D. & D. 368, affirming *Ex parte Davidson*, 1 M. D. & D. 648.

(n) *Ex parte Ashmead* [1893], 1 Q. B. 590.

(o) 46 & 47 Vict. c. 52, § 6.

(p) See Comp. Act, 1862, § 75; *Ex parte Canwell*, 4 De G. J. & S. 539. See as to calls made under the Winding-up Acts, 1848-49, *Williams v. Harding*, L. R. 1 H. L. 9.

Bk. III. Chap. 8. The doctrine that on the bankruptcy of one member of a firm the whole firm is dissolved is not applicable to companies with transferable shares (q).

Shares vest in trustee.

Upon the bankruptcy of a shareholder all his property, including his shares, vests first in the official receiver, and afterwards when a trustee is appointed in the trustee (r); but subject to disclaimer, as will be seen presently. Shares held by the bankrupt as trustee do not pass to his trustee in bankruptcy (s); and shares which are in the order and disposition of the bankrupt, but in which other persons have an interest by way of mortgage or otherwise do not now pass to his trustee under the reputed ownership clause (t); the trustee, in short, is only entitled to the interest of the bankrupt in the shares, and if they are subject to a lien either in favour of the company (u), or of any third party (x), the trustee's right to the shares is subject to the same lien.

Trustee not a shareholder.

It must not, however, be supposed that the effect of vesting a bankrupt's property, including his shares, in his trustee, is to make the trustee a shareholder, i.e., a member of the company in which the shares are held (y). In order to become a shareholder the trustee must do whatever may be necessary by the regulations of the company to render himself a member thereof. The vesting of the bankrupt's property in the trustee entitles the trustee, but does not oblige him, to become a member. His right to become a member can be exercised even after the lapse of a considerable time, if nothing has

(q) See *Ex parte Broadbent*, 1 Mont. & A. 638; *Bentley v. Bates*, 4 Y. & C. Ex. 190, as to mining partnerships.

(r) 46 & 47 Vict. c. 52, §§ 43, 44, 54. See as to the old law and the vesting of onerous property, *Copeland v. Stephens*, 1 B. & A. 593.

(s) *Ib.*, § 44 (1), and see *Pinkett v. Wright*, 2 Ha. 120; *Joy v. Campbell*, 1 Sc. & Lef. 328.

(t) *Ib.*, § 44 (3); *Colonial Bank v. Whinney*, 11 App. Ca. 426, reversing S. C. 30 Ch. D. 261. The older authorities collected in former editions are omitted as no longer

useful.

(u) See *Child v. Hudson's Bay Co.*, 2 P. W. 207; *Ex parte Cooper*, 2 M. D. & D. 1. See, too, *Pinkett v. Wright*, 2 Ha. 120, where, however, it was held that a banking company had no lien on the shares of a customer who had overdrawn his account. See, too, *Meliorucchi v. Royal Ex. Co.*, 1 Eq. Ca. Ab. 9.

(x) See *Ex parte Dobson*, 2 M. D. & D. 685; *Ex parte Moss*, 3 De G. & S. 599.

(y) See *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129, and the next note.

been done either by him or the company depriving him of Bk. III. Chap. 8. such right (z).

Speaking generally a trustee of a bankrupt shareholder may take one or other of the following courses, viz.:— Registration in name of trustee.

1. He may cause the shares to be transferred into his own name (or do whatever else is necessary) and thereby become himself a member of the company in respect of them. The regulations of the company may possibly not entitle him to take this course; but this is rarely if ever the case. A clause empowering directors to decline to register a transfer to a person disapproved by them or indebted to the company does not apply to a trustee claiming the shares under the Bankruptcy Act (a). But the trustee has no right to be registered as owner if the bankrupt has executed a transfer to another person who has such right (b); and even the consent of such person will not entitle the trustee to be registered so long as the transfer already executed remains in force (c).

If the trustee elects to take the shares and to be registered in respect of them he becomes himself a shareholder to all intents and purposes; and it is very seldom therefore that he takes this course.

2. The trustee may, without himself becoming a shareholder, sell or dispose of the bankrupt's shares. A provision to this effect is usually inserted in a company's regulations (d); but whether there is or is not such a clause in them, the Bankruptcy Act, 1883, authorises the trustee to take this course (e). So long as the shares are retained in the bankrupt's name unsold the trustee incurs no personal liability to the company in respect of them. On the other hand, not being himself a shareholder, notices of meetings, of calls, and of forfeiture of shares, will not be sent to him but to the bankrupt. Consequently, if a call is made and not paid, and Sale by the trustee.

(z) *Graham v. Van Diemen's Land Co.*, 11 Ex. 101, where five years had elapsed. Compare *Lon. and Provincial Tel. Co.*, 9 Eq. 653; *Lawrence v. Knowles*, 5 Bing. N. C. 399, where the right was lost. As to disclaimer, see *infra*.

(a) *Bentham Mills Spinning Co.*,

11 Ch. D. 900.

(b) *Ex parte Harrison*, 28 Ch. Div. 363.

(c) *Ib.*

(d) The Companies Act, 1862, Table A., contains such a provision; see art. 14.

(e) 46 & 47 Vict. c. 52, § 50 (cl. 3).

Shares left by name of bankrupt.

Bk. III. Chap. 8. the company has power to forfeit shares for the non-payment of calls, the trustee's title may be defeated by a forfeiture of which he has not received notice (*f*). So he may lose his right to them by a transfer to a *bonâ fide* purchaser for value without notice. This was decided in a case where the assignee did nothing for five years. In the meantime the bankrupt died; his widow and executrix became registered in respect of his shares, and she afterwards sold them and the purchaser was registered. The assignee then claimed them, but the V.-C. James held that the purchaser had acquired a good legal title to them (*g*).

Disclaimer.

Bank. Act, 1883,
§ 55.

3. The trustee may disclaim the shares. The provision in the Bankruptcy Act, 1883, relating to the disclaimer of onerous property differs in many important respects from those contained in former Bankruptcy Acts, and decisions on them must not be relied upon as applicable to the law as it now stands (*h*).

The following is the substance of the present enactment relating to the disclaimer of shares:—

1. The trustee may disclaim them by writing signed by him at any time within twelve months after the first appointment of a trustee; or within twelve months after he first became aware of their existence (*i*).

2. He may disclaim them, although he may have tried to sell them, or has taken possession of them, or exercised any act of ownership in relation to them (*k*).

3. The disclaimer determines as from its date the rights, interests, and liabilities of the bankrupt and of his property in respect of the shares (*l*).

(*f*) *Graham v. Van Diemen's Land Co.*, 1 H. & N. 541.

(*g*) See *London and Provincial Tel. Co.*, 9 Eq. 653. The purchaser had at any rate the better title in equity to be registered, and being registered, the assignee could not disturb him by having the register rectified, which was what he sought.

(*h*) See for the present law 46 & 47 Vict. c. 52, § 55, and 53 & 54 Vict. c. 71, § 13. Section 55 was much discussed with reference to leases in

Ex parte the Clothworkers' Co., 21 Q. B. D. 475. The older cases are *Ex parte Budden*, 12 Ch. D. 288; *Ex parte Walton*, 17 ib. 746; *Levi v. Ayers*, 3 App. Ca. 842; *Hill v. E. & W. In. Docks Co.*, 9 App. Ca. 448.

(*i*) § 55, cl. 1, amended by 53 & 54 Vict. c. 71, § 13. See *Wilson v. Wallani*, 5 Ex. D. 155, as to signature by an agent.

(*k*) *Ib.*

(*l*) § 55, cl. 2.

4. It also discharges the trustee from all personal liability Bk. III. Chap. 8. in respect of them as from the date when they vested in him (m).

5. But except so far as necessary for the purpose of releasing the bankrupt and the trustee, the disclaimer does not affect the rights or liabilities of any other person (n).

6. The trustee cannot disclaim if an application in writing has been made to him by any person interested in the shares requiring him to decide whether he will disclaim or not, and he has for twenty-eight days (or such extended time as may be allowed by the Court) declined or neglected to give notice whether he disclaims or not (o).

7. The Court may make an order vesting the shares in any person or trustee for any person entitled to them or to compensation for any liability in respect of the shares not discharged by the Act (p).

8. Any person injured by the disclaimer is deemed to be a creditor of the bankrupt to the extent of the injury, and may prove the same accordingly against the bankrupt estate (q). If the disclaimer is of a contract to take shares in a company which is itself in liquidation, it would seem that the liquidator cannot prove for more than the amount of the excess of the company's liabilities over its assets, although the nominal amount of the shares in the contract disclaimed exceeds this amount (r).

The short effect of a disclaimer of shares appears, therefore, to be as follows:—1, the bankrupt and the trustee are discharged from all future liability in respect of them; 2, they have no further right or interest in them; 3, the company can apparently apply for an order vesting the shares in itself or some trustee for itself (s); 4, the company can prove against

(m) § 55, cl. 2.

(n) *Ib.*

(o) *Ib.*, cl. 4.

(p) *Ib.*, cl. 6, much abridged.

(q) *Ib.*, cl. 7. See *Ex parte Davis*, 3 Ch. D. 463.

(r) *Ex parte United Ordnance, &c.*, Co. [1899], 2 Q. B. 579. In *Ex parte National Ins. Co.*, W. N. 1894,

p. 156, the liquidator was allowed to prove for the full amount of the unpaid calls. *Quære*, if there is any difference between a disclaimer of shares and a disclaimer of a valid contract to take them?

(s) This will not be clear until it is decided. See *Ex parte the Cloth-workers' Co.*, 21 Q. B. D. 475.

Bk. III. Chap. 8. the bankrupt's estate for any damage it may sustain by the disclaimer. If the shares are subject to any mortgage or equitable charge the bankrupt and his trustee will be released from all liability in respect of the shares; but the mortgage or charge will not be affected; and the person entitled thereto will apparently be entitled to an order vesting the shares in himself free from redemption. Whether the company can compel him to take the shares or allow the company to have them, and in the latter case to take them free from the mortgage or charge, are questions not yet settled by decision (*t*).

Shares agreed to be sold.

A trustee cannot disclaim a contract entered into by the bankrupt for the sale of his shares, unless he also disclaims the shares themselves (*tt*).

Proof of debts.

Under the Bankruptcy Act, 1883, § 37, every conceivable debt or money demand, liquidated or unliquidated, present or future, vested or contingent, can be proved with two exceptions, viz., (1) demands for unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust; and (2) demands which in the opinion of the Court are incapable of being fairly estimated (*u*).

A transferor of shares to a bankrupt can now prove in respect of his right of indemnity (*x*) by his transferee, although the transfer may not have been perfected.

Proof by unincorporated companies.

An ordinary partnership cannot prove against the separate estate of one of its members, except under special circumstances; for to allow such a proof would be inconsistent with the general principle that a person cannot prove against his own estate in competition with his own creditors (*y*). The application of this principle to unincorporated companies seeking to prove against a bankrupt shareholder in competition with his other creditors has given rise to some difficulty. The question, however, now seldom arises. It is now settled that the rule does not apply to proofs by banking companies

(*t*) See the case last referred to, and observe that § 55 and 53 & 54 Vict. c. 71, § 13, contain special provisions applicable to leases but not to shares.

(*tt*) *Re Bastable* [1901], 2 K. B. 518, a decision relating to a contract

to sell a lease.

(*u*) See as to these, *Hardy v. Fothergill*, 13 App. Ca. 351.

(*x*) *Holmes v. Symons*, 13 Eq. 66, shows that this formerly was not so.

(*y*) See *Partn.*, 746 *et seq.*

empowered to sue by public officers by the Act 7 Geo. 4, c. 46 (z); Bk. III. Chap. 8. nor to proofs by liquidators of unincorporated companies being wound up (a). The difficulty cannot arise in the case of incorporated companies; but it may arise where the proving company is merely a large partnership not empowered to sue by a public officer, and not being wound up. No case has been met with in which proof by a cost-book mining company has been discussed.

Calls on shares made before adjudication are, and always Proof for calls. have been, provable like other debts; and it is immaterial whether such calls are made by directors whilst a company is carrying on business, or by liquidators when a company is being wound up (b). But with respect to calls made after Old law. adjudication, the authorities were not a little embarrassing. Calls made by directors after adjudication were not provable under the Bankruptcy Act of 1849, it being wholly uncertain at the time of adjudication whether they would ever be made or not; they were consequently neither debts payable presently or at a future time, nor were they debts payable on a contingency within the meaning of that Act (c). Neither did the Bankruptcy Act of 1861 make such calls provable (d). The same reasons were as applicable to calls made under the Winding-up Acts as to other calls; but the decisions respecting such calls were not uniform (e).

The difficulties arising from the conflict of these decisions Companies Act, 1862, § 75. were intended to be removed by § 75 of the Companies Act, 1862. But this section itself gave rise to further difficulties; and it was ultimately decided, (1) that the liability of a contributory to calls made in a winding up under that Act commenced

(z) *Re Caldecott*, 2 M. D. & D. 361, affirming *Ex parte Davidson*, 1 ib. 648.

(a) *Ex parte Ball*, 10 Ch. 48.

(b) As in *Ex parte Brown*, 3 De G. & Sm. 590.

(c) *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129; *Wylam's Steam Fuel Co. v. Street*, 10 ib. 849; *Re J. H.*, Ir. Rep. 3 Eq. 245. See, also, *General Discount Co. v. Stokes*, 17

C. B. N. S. 765.

(d) See 24 & 25 Vict. c. 134, §§ 150 *et seq.*

(e) See, on the one hand, *General Discount Co. v. Stokes*, 17 C. B. N. S. 765, and on the other, *Parbury's case*, 3 De G. F. & J. 80, and *Ex parte Nicholas*, 2 De G. M. & G. 271. See, also, *Chapple's case*, 6 De G. & Sm. 400; *Greenshield's case*, ib. 599.

Bk. III. Chap. 8. when he became a member (*f*); (2) that if the winding up preceded his bankruptcy, all future calls might be proved against his estate (*g*); (3) but where he was adjudicated bankrupt before the winding up, calls made in the winding up could not be proved at all (*h*); and consequently in this case the bankrupt remained liable for all calls made while he continued a shareholder.

Present law. The Bankruptcy Act, 1869, abolished these unnecessary distinctions (*i*); and the Bankruptcy Act, 1883, is similar to it. Under this Act, when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not (*k*). If the shares are neither disclaimed nor sold by the trustee, but are allowed to remain in the name of the bankrupt, and he obtains his discharge, it seems that he will nevertheless be freed from calls in respect of them, as his liability to them was capable of proof (*l*).

Lien. A company entitled to a lien for calls on shares registered in a bankrupt's name is a secured creditor, and cannot therefore prove without giving up its lien (*m*).

Set-off. The ordinary rules as to set-off and mutual credit apply to bankrupt shareholders. As regards companies which are being wound up, the Companies Act, 1862, provides in effect that debts due to a contributory from a limited company

(*f*) *Ex parte Canwell*, 4 De G. J. & S. 539. See, also, *Williams v. Harding*, L. R. 1 H. L. 9.

(*g*) *Ex parte Pickering*, 4 Ch. 58; *Mitchell's case*, 5 Ch. 400; *M'Ewen's case*, 6 Ch. 582; where the bankrupt was a past member; *Ex parte Marshall*, 7 Ch. 324; *Financial Corporation v. Lawrence*, L. R. 4 C. P. 731, and the cases in the next note. *Holmes v. Symons*, 13 Eq. 66, is not opposed to these.

(*h*) *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Hastie's case*, 7 Eq. 3, and 4 Ch. 274; *Ex parte King*, 3 Ch. 10. It was left

doubtful whether in this case they could be proved if made before the bankrupt's estate was distributed, or if the assignee took the shares. See L. J. Giffard's judgment, 4 Ch. 278.

(*i*) See 32 & 33 Vict. c. 71, §§ 23, 24, 31.

(*k*) See 46 & 47 Vict. c. 52, §§ 37, 55; *Re McMahon* [1900], 1 Ch. 173.

(*l*) *Mercantile Mutual Marine Ins. Ass.*, 25 Ch. D. 415. Compare *Furdoonjee's case*, 3 Ch. D. 264, which arose under an Indian Insolvency Act.

(*m*) See *Re Jennings*, 1 Ir. Ch. 236 & 654, and *ante*, p. 637.

which is being wound up cannot be set off by him against calls made upon him (n). But it has nevertheless been decided that if the liquidator proves for a call against the estate of a bankrupt contributory to whom the company is indebted, the mutual credit clause applies, and a set-off must be allowed (o).

The combined effect of the sections of the Bankruptcy Act, Summary. 1883, relating to the vesting and disposition of property (§§ 43, 44, 50, 54), disclaimer (§ 55), and the proof of debts (§ 37), seems to be as follows:—

1. That the legal right to a bankrupt's shares vests in his trustee ;

2. That the shares do not vest in the trustee so as to make him a shareholder in place of the bankrupt ;

3. That the trustee can, without the concurrence of the bankrupt, sell and transfer or otherwise dispose of his shares for the benefit of his estate ;

4. That this right can only be exercised by the trustee, subject to the same conditions as regards consents, payment of calls in arrear, and the like, as the bankrupt himself would have had to comply with if he had been the transferor ;

5. That if the shares cannot be disposed of beneficially for the estate, they may be disclaimed by the trustee, and so be got rid of altogether ;

6. That inasmuch as under § 37 all calls due and to become due can be proved, the bankrupt when discharged will be free from liability in respect of the shares, whatever the trustee may do with them ;

7. That practically even calls in arrear will not be proved if the company has a lien on the shares, and they are worth more than the amount due in respect of them : for the company will then retain the shares and realise them if not redeemed ;

8. That practically calls not in arrear will not be proved if the shares are transferred by the trustee ; for the company will look to the transferee for all future calls (p) ;

(n) 25 & 26 Vict. c. 89, §§ 101 *Caralli and Haggard's claim*, 4 Ch. & 38, cl. 7. See *infra*, Bk. IV., c. 1, 714 ; *Ex parte Strang*, 5 Ch. 492.
§ 14 (b).

(p) But it is apprehended that future calls can be proved in this case.

(o) *Re Duckworth*, 2 Ch. 578 ;

Bk. III. Chap. 8.

9. That future calls will be proved if the trustee does nothing (*q*).

10. That if the trustee disclaims, the damages occasioned by the disclaimer will be proved, but the amount of such damages is not necessarily the amount unpaid on the shares disclaimed (*r*).

The liability of trustees in bankruptcy to be made contributories will be considered hereafter (see Book IV., c. 1, § 13).

Sale to private
company and
bankruptcy of
vendor.

The sale by a trader of his business to a company in consideration of paid-up shares may be a fraud upon the trader's creditors and an act of bankruptcy on his part. If this be so and the trader is made a bankrupt within three months of the sale, his trustee in bankruptcy will be entitled to the assets of the business comprised in the sale, and such assets will be divisible amongst the trader's creditors, and not amongst the creditors of the company (*s*).

If they cannot the bankrupt may still be liable in some cases as a past member, which evidently is not intended.

(*q*) The calls can be proved if the trustee does nothing. See *Ex parte Davis*, 3 Ch. D. 463.

(*r*) *Ex parte United Ordnance, &c.*,

Co. [1899], 2 Q. B. 579, and *ante*, p. 751.

(*s*) *Re Carl Hirth* [1899], 1 Q. B. 612, where the company was also in liquidation; *Ex parte Jeffreys* [1895], 2 Q. B. 624, cannot be relied upon since the decision of *Salomon v. Salomon & Co.* [1897], A. C. 22.

CHAPTER IX.

OF ACTIONS BETWEEN COMPANIES AND THEIR MEMBERS, AND
BETWEEN THE MEMBERS THEMSELVES.*General Observations.*

THE mutual rights and obligations of shareholders and directors having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced. Bk. III. Chap. 9.

In the volume on Partnership, it was pointed out that an unincorporated firm or company could not at common law sue one of its members, nor could he sue it (a), and that this inconvenience could not be avoided by an agreement amongst the members that some officer, *e.g.*, the secretary or treasurer of the company, should sue and be sued on its behalf (b). The consequences of these doctrines were very serious to unincorporated companies of many members. Companies which were neither incorporated nor empowered to sue their own shareholders by public officers, frequently found it extremely difficult to compel the payment of money due to them from such shareholders by any direct proceeding against them. This difficulty often led to the crooked expedient of "putting a creditor on a shareholder;" that is to say, of compelling a shareholder to pay what he owed to the company by inducing some creditor of the company to single him out and sue him for the company's debt at the costs of the company. This expedient was usually found to answer the purpose, inasmuch as the shareholder could only resist the creditor's action by pleading the non-joinder of

Putting a creditor on a shareholder.

(a) Partn. 459 *et seq.*

(b) See *Evans v. Hooper*, 1 Q.B. D. 45; *Corner v. Maxwell-Irwin*, Ir. Rep. 10 C. L. 354; *Gray v. Pearson*, L. R. 5 C. P. 568, the case of a mutual marine insurance society; *Hybart v. Parker*, 4 C. B. N. S. 209, the case of a cost-book mining com-

pany. By 32 & 33 Vict. c. 19, § 13, calls might be sued for by the purser, but the practice is now changed; see *ante*, p. 379. As to bills payable to the holder of an office for the time being, see 45 & 46 Vict. c. 61, § 7, cl. 2.

Bk. III. Chap. 9.

Interference
of a court of
equity in such
a case.

the other shareholders in abatement; and this it was almost always impossible to do with effect. Rather therefore than allow the creditor to obtain judgment, the unfortunate shareholder made terms with the directors. It is obvious that the grossest oppression might be exercised in this manner, and whatever might be said in defence of putting a creditor on an obstinate shareholder who would not pay, and could not be otherwise made to pay, what he justly owed to the company, nothing could possibly be said in its favour in any other case. Fortunately, courts of equity would always interfere in such cases, and both restrain proceedings by the creditor and compel those who "put him on," to deal fairly with the person sued. Whatever the rights of the creditor might have been, if he had been suing *bonâ fide* (c), he was not regarded in cases of the present description as having any greater rights than those whose tool he was (d). If the shareholder sued was entitled to have the accounts of the company taken, and to have its assets applied in payment of its debts, the Court would make a decree accordingly (e), if the necessary parties were before the Court (f). But a court of equity would only interfere to protect the shareholder on the terms of his doing what was just towards the company; and would, if there was reason to believe that he ought to pay what the company sought to make him pay, require him to pay that sum into court (g).

The mere fact, moreover, that a shareholder in a company is being sued by a creditor at the instance of the company, is not sufficient to induce a court to make an order for winding up the company (h).

(c) If he was so suing, the Court would not interfere, *Green v. Nixon*, 23 Beav. 530; *Beck v. Dean*, 3 Jur. N. S. 14.

(d) See *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84, and *Bargate v. Shortridge*, 5 H. L. C. 297; *Horn v. Kilkenny, &c., Rail. Co.*, 1 K. & J. 399. See, also, *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(e) *Fernihough v. Leader*, 4 Ra. Ca. 373, and *Lewis v. Billing*, ib. 414.

(f) See *Sibley v. Minton*, 27 L. J. Ch. 53.

(g) See *Cutts v. Riddell*, 1 De G. & S. 226; *Sibley v. Minton*, 27 L. J. Ch. 53. This last was the case of a cost-book mining company, a shareholder in which would not pay his calls.

(h) See *infra*, Bk. IV., c. 1, § 4, and *Ex parte Wyld*, 1 Mac. & G. 1; *Ex parte Lawton*, 1 K. & J. 204; *Ex parte Watson*, 3 De G. & S. 253; *Ex parte Wise*, 1 Drew. 465.

The inconveniences arising from the state of the law above alluded to, were effectually removed by incorporating the company; for a member of a body corporate might always sue or be sued by it just as if he were not a member; and whether the body corporate was a company having gain for its object or not, is and always was immaterial with reference to its capacity of suing and being sued.

Bk. III. Chap. 9.

Effect of
incorporation.

The institution of a public officer to sue and be sued on behalf of the members of an unincorporated company, is not necessarily so efficacious for the purposes now under discussion as the incorporation of the company. For the public officer may be so constituted as to represent the members as individuals, and only to represent them all, and not all less some or one of them. If in such a case he sues one of the members of the company which he represents, he in fact either represents the member sued as well as all the other members, or nobody at all, and in either case his action will be improper (i). In most modern Acts of Parliament, however, care has been taken to avoid this objection, and to render the public officer the representative of the company as distinct from the individuals composing it; and where this is done, legal proceedings between the public officer and those individuals or any of them, are theoretically as unobjectionable as are legal proceedings between incorporated companies and their shareholders. The tendency in modern times, moreover, is to regard companies empowered to sue and be sued more in the light of corporate bodies than formerly, and to treat public officers as the representatives of collective wholes rather than as the representatives of members individually (k).

Effect of
enabling com-
pany to sue and
be sued by a
public officer.

The general effect of the Judicature Acts, so far as they relate to legal proceedings by companies, has been already investigated (Bk. II., c. 7); and it was then seen that an unincorporated company can now sue and be sued in its mercantile name; and that where parties are numerous and have a common interest, some of them may sue and be sued on behalf

Effect of the
Judicature
Acts.

(i) See *Hichens v. Congreve*, 4 10 Sim. 58. See, too, *per Lord Russ.* 562; *MacMahon v. Upton*, Eldon in *Van Sandau v. Moore*, 1 2 Sim. 473; *Hughes v. Thorpe*, 5 Russ. 460 & 472.
M. & W. 666; *Seddon v. Connell*, (k) See *infra*, p. 762.

Bk. III. Chap. 9. of all in respect thereof. Further, there is now the same facility
 Sect. 1. in arranging parties to actions in all divisions of the High Court as there was formerly in arranging parties to suits in equity; and the fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against another should fail; at most, such a circumstance may render it expedient to transfer the action from one division of the High Court to the other at some stage of the action.

Actions by and
 against the
 company.

It has not yet been decided whether an action in the name of an unincorporated company can be maintained by or against one of its own members; but the writer sees no difficulty in principle in supporting such an action; the company being regarded for the purposes of the action as one collective whole (*l*). This, however, is comparatively an unimportant matter, as will be seen later, when considering actions by one member on behalf of himself and others (see *infra*, pp. 763 *et seq.*).

Actions by or
 against some
 on behalf of
 others.

With respect to actions by or against some members of companies on behalf of themselves and others, it must be borne in mind that suits in this form have long been familiar in courts of equity, and certain rules respecting them have been settled which are not interfered with by the Judicature Acts. The rules will be fully investigated presently.

SECTION I.—OF THE PARTIES TO SUE AND BE SUED.

1. *Actions by and against incorporated companies.*

Actions between
 incorporated
 companies and
 their members.

An incorporated company can only sue and be sued in its corporate name; and this rule applies as much to actions by and against its own members as to actions by and against other persons. Accordingly it has been held that a registered

(*l*) Such actions are common in Scotland. An action by a firm may be maintained in its name against any of its members; see R. S. C.

Ord. XLVIII., r. 10. *Semble*, the rule applies to unincorporated companies.

joint-stock company can support an action against one of its own shareholders for damages for a libel on the company published by him (*m*). A shareholder of an incorporated company may be a creditor of or debtor to the company, just as if he were not a member of it. It follows from this, that he may not only sue it, but having obtained judgment against it, he may execute that judgment against his co-shareholders, if they are liable to be proceeded against in that way by ordinary creditors. Moreover, a court will not interfere at the instance of the shareholders proceeded against, and stay execution against them, either on the ground that the plaintiff is himself a member of the company, and bound therefore to contribute to his own payment, or upon the ground that the rights of the parties cannot be ascertained without taking the accounts of the company. In the case supposed the plaintiff is a creditor of the company, and not the less so for being a shareholder in it; and to deprive him of his rights as a creditor would be to defeat one of the objects for which the company, as such, has any existence (*n*). But one shareholder will not be allowed to buy up and put in force against a co-shareholder a debt of the company, if the object of the execution creditor is to obtain by means of that debt payment of other monies to which he is not justly entitled (*o*).

An action to recover property of a company, or to make its directors answerable for the misapplication of its funds, ought to be brought in the name of the company (*p*), and the directors cannot require all the persons liable to indemnify them to be made parties (*q*).

(*m*) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87. That an action may lie the libel must affect the company's property or business; *Mayor, &c., of Manchester v. Williams* [1891], 1 Q. B. 94. If the libel is calculated to injure its reputation in the way of its business, special damage need not be alleged; *South Hetton Coal Co. v. North-Eastern News Ass.* [1894], 1 Q. B. 133. See, too, *Yorkshire Provident, &c., Co. v. Gilbert*

and *Rivington*, [1895], 2 Q. B. 148.

(*n*) See *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(*o*) *Woodhams v. Anglo-Australian, &c., Co.*, 2 De G. J. & Sm. 162.

(*p*) *Gray v. Lewis*, 8 Ch. 1035; *Duckett v. Gover*, 6 Ch. D. 82; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474.

(*q*) *Wye Valley Rail. Co. v. Hawes*, 16 Ch. D. 489.

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The cases in which some of the members of an incorporated company can sue or be sued on behalf of themselves and others will be considered presently (pp. 769 *et seq.*).

2. Of actions by and against public officers.

Representation
of parties by
public officers.

Upon the ground that the public officer of a company only represents all the shareholders, and not any one or more of them as against the others (*r*), it was twice held by Lord Eldon, that a suit for the dissolution of a company empowered to sue and be sued by its secretary, was defective for want of parties, although the suit was instituted by one shareholder on behalf of himself and others, against the secretary and the directors of the company (*s*). In tracing the history of joint-stock companies in the celebrated case of *Van Sandau v. Moore*, Lord Eldon prominently alluded to the inability of a public officer to represent the company in suits between its members (*t*), and this doctrine was carried out to its full extent by the late Vice-Chancellor Shadwell (*u*), who held (*x*) that neither the Act of 7 Geo. 4, c. 46, nor the subsequent Act of 1 & 2 Vict. c. 96, empowered the public officer to represent all the members of the company except one, in a suit between him and them as members. But notwithstanding these authorities an action may be instituted by the public officer of a company against some of its members, if the question in dispute is one between the company as a collective whole, on the one side, and those individual members on the other; and it has accordingly been held that, under the Joint-stock Banking Act, 7 Geo. 4, c. 46, it is competent for a public officer of a company governed by that Act to sue the directors of the company for the purpose of making them account for breaches of trust and mismanagement; and in such an action none of the shareholders need be parties, although the company has ceased to carry on business, except for the purpose of winding up its affairs (*y*). The public

(*r*) See *ante*, pp. 379 *et seq.* and 759. Sim. 473; *Seddon v. Connell*, 10

(*s*) *Davis v. Fisk*, cited in You. Sim. 58; *Abraham v. Hunnay*, 13 425; and *Van Sandau v. Moore*, 1 Sim. 581.

Russ. 441. (*x*) In *Seddon v. Connell*, 10 Sim.

(*t*) See 1 Russ. 460 & 472, and 58.

Hichens v. Congreve, 4 Russ. 562. (*y*) *Harrison v. Brown*, 5 De G.

(*u*) In *MacMahon v. Upton*, 2 & Sm. 728.

officer is the proper person to sue a shareholder for calls made payable to him by the company (2).

The Stannaries Act, 1869, expressly authorises the purser of a cost-book mining company to sue a shareholder for calls, although the Act does not authorise such a company to sue and be sued generally by its purser (a); but, as has been already observed, the practice in this respect has been altered, and an action for calls must, it seems, now be brought in the name of the company (b).

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Action for calls.

Action by
purser.

3. *Of actions by one member on behalf of himself and others.*

Actions by one member of a class of persons on behalf of himself and all others of that class, have long been familiar in courts of equity (c). Actions in this form are permissible when their object is to obtain relief to which the whole class is entitled, and when the members of the class are so numerous that they cannot all be made parties by name (d). The plaintiff must be a member of the class on whose behalf he sues (e), and the class must be specified as accurately as possible (ee). If the defendants are a numerous class, one or more of them may be sued or may be authorised by the Court to defend on behalf of the others, and a person may be authorised to defend in this manner against his will (f).

(2) See as to banking companies governed by 7 Geo. 4, c. 46; *Chapman v. Milvain*, 5 Ex. 61, removing the doubt expressed in *Hughes v. Thorpe*, 5 M. & W. 656. See, too, *Ex parte Hull*, 3 Deac. 405. As to other companies, see *Lawrence v. Wynn*, 5 M. & W. 355; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715, in each of which an action for calls by a public officer was successful. See, too, *Smith v. Goldsworthy*, 4 Q. B. 430; *Reddish v. Pinnock*, 10 Ex. 213.

(a) 32 & 33 Vict. c. 19, § 13.

(b) See *ante*, pp. 379 and 384.

(c) See *Walworth v. Holt*, 4 M. & Cr. 619, and the cases in the next note.

(d) *Bedford (Duke of) v. Ellis* [1901], A. C. 1, where many of the earlier authorities are collected and commented on, and *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901], A. C. 426. In *Temperton v. Russell* [1893], 1 Q. B. 435, this rule is stated in too narrow terms. Twenty used to be the minimum. See *Harrison v. Stewardson*, 2 Ha. 530. But see *Fripp v. Chard Rail. Co.*, 11 Ha. 258. See now Ord. XVI., r. 9.

(e) *London Association of Shipowners v. London, &c., Joint Committee* [1892], 3 Ch. 242.

(ee) *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36.

(f) B. S. C. Ord. XVI., r. 9;

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Actions to
restrain direc-
tors from im-
proper acts.

Apperley v.
Page.

Debenture-
holders.

Thus, for the purpose of rescinding an agreement illegally entered into by the directors of an incorporated company, or for the purpose of restraining them from doing that which is illegal, an action may be instituted by one shareholder on behalf of himself and all the others, except the defendants, against those directors (*g*).

Again in *Apperley v. Page* (*h*), it was held that a suit could be sustained by some shareholders of a provisionally registered railway company on behalf of themselves and all the other shareholders except the defendants, against the directors, for the purpose of having the assets of the company realised and applied in payment of its debts, and for the distribution of the surplus amongst the shareholders.

This form of action, moreover, is constantly adopted where numerous partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct (*i*); or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations (*k*). So in the case of mutual insurance societies and friendly societies one member may sue the trustees or committee and one of each class of members as representing all the other members, where the object of the action is to obtain payment of what is due to the plaintiff (*l*). So in the case of debenture-holders, one debenture-holder may sue on behalf of all the other holders of debentures of the same series as his own (*m*),

Wood v. McCarthy [1893], 1 Q. B. 775; and as to plaintiffs, see *infra*, p. 767, note (*f*).

(*g*) *Gray v. Chaplin*, 2 Sim. & Stu. 267, reversed on appeal on the ground of delay and acquiescence, 2 Russ. 126.

(*h*) 1 Ph. 799. See, also, *Butt v. Monteaux*, 1 K. & J. 98; *Sheppard v. Orenford*, ib. 491; *Cramer v. Bird*, 6 Eq. 143; *Wilson v. Stanhope*, 2 Coll. 629; *Harvey v. Collett*, 15 Sim. 332; *Cooper v. Webb*, ib. 454; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684; *Richardson v. Hastings*,

7 Beav. 323; *Sibson v. Edgeworth*, 2 De G. & S. 73. Compare *Williams v. Salmond*, 2 K. & J. 463.

(*i*) *Chancey v. May*, Prec. in Ch. 592; *Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & Cr. 134; *Beck v. Kantorowicz*, 3 K. & J. 237.

(*k*) See *Small v. Atwood*, You. 407, and *infra*, p. 767.

(*l*) See *Pare v. Clegg*, 29 Beav. 589; *Bromley v. Williams*, 32 ib. 177; *Harvey v. Beckwith*, 2 Hem. & M. 429.

(*m*) See *ante*, pp. 334 *et seq.*

and the holder of debentures of two different series may sue on behalf of the other holders of both series (*mm*). Bk. III. Chap. 9.
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Moreover, where it is permissible, on the principles above explained, for one person to sue on behalf of himself and others, he ought so to sue or his action will be defective for want of parties. But there are exceptions to this; for it seems settled that any one shareholder can maintain an action against a company to restrain the company from doing an act that is illegal or *ultra vires* (*n*); and if a plaintiff sues alone when he ought to sue on behalf of himself and others, an amendment would probably be allowed. Actions by one shareholder on his own behalf.
When permissible.

Where the plaintiff does not seek redress in respect of any injury or injustice to himself and others, *i.e.*, where he seeks redress in respect of some injury or injustice to himself, he not only can sue in his own name alone but he ought so to sue. For example, a shareholder may sue on his own behalf only to restrain the improper rejection of his vote (*o*), his wrongful exclusion from acting as director (*p*), or a refusal to allow him to inspect the company's register (*q*). When proper.

A plaintiff cannot sue on his own behalf and also on behalf of a class in the same action, unless the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the class arises out of the same transaction or series of transactions (*r*). Action by one on his own behalf and on behalf of others.

In order that an action may be sustainable by one or more persons on behalf of themselves and others, it is essential that the interests of the plaintiffs on the record, and of those Identity of interests necessary.

(*mm*) See *Borough of Portsmouth, &c., Tram. Co.* [1892], 2 Ch., p. 363. 23 Ch. D. 14; *Broune v. La Trinidad*, 37 Ch. D. 1.

(*n*) See *Hoole v. Great Western Rail. Co.*, 3 Ch. 262. *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474, at p. 481. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712. (*q*) *Mutter v. Eastern and Midlands Rail. Co.*, 38 Ch. D. 92; *Holland v. Dickson*, 37 Ch. D. 669.

(*o*) *Pender v. Lushington*, 6 Ch. D. 70; *Moffatt v. Farquhar*, 7 Ch. D. 591. (*r*) *Stroud v. Lawson* [1898], 2 Q. B. 44, where the plaintiff claimed on his own behalf damages against the directors for fraud, and on behalf of the other shareholders to make the directors repay to the company dividends improperly paid; *R. S. C. Ord. XVI.*, r. 1. See, too, *Bedford (Duke of) v. Ellis* [1901], A. C. 1.

(*p*) *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610; *Munster v. Cummel Co.*, 21 Ch. D. 183; *Bainbridge v. Smith*, 41 Ch. D. 462; and see *Harben v. Phillips*,

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Sect. 1.

— others whom they assume to represent, should be, in a judicial point of view, identical, and be proved to be so by the plaintiffs (s). Consequently a shareholder in a company who has sold his shares, and has no longer any interest in the company, cannot sustain an action on behalf of himself and the other shareholders for an account of the dealings and transactions of the company or of its directors, and to have its assets applied in discharge of its liabilities. For, whether he is or is not still under liabilities from which he is entitled to be freed, he has no right, having sold all his interest in the company, to assume to represent those with whom he has no longer anything to do (t). Upon the same principle it has been said that a shareholder who is a mere trustee, having no beneficial interest in the company, is not a proper person to sue on behalf of himself and other shareholders (u).

Plaintiff a
nominee of a
rival company.

Neither can an action by one shareholder on behalf of himself and others be maintained by a person who does not honestly represent the interests of his co-shareholders, but who is the nominee of a rival company (x). A bill by such a plaintiff has even been taken off the file (y). But the mere circumstance that the plaintiff has bought a share recently to enable himself to bring an action, does not warrant the Court in dismissing it (z).

Joint right of
action.

It was at one time considered that a suit by one person on

(s) See as to calls, *infra*, pp. 773, 774, and *Ward v. Sittingbourne and Sheerness Rail. Co.*, 9 Ch. 488; *Clay v. Rufford*, 8 Ha. 281; *Williams v. Salmon*, 2 K. & J. 463; *Sibson v. Edgworth*, 2 De G. & S. 73; in which case the defendant pleaded that the interests of the plaintiff and those he assumed to represent, were not identical. See, also, *Thomas v. Hobler*, 4 De G. F. & J. 199; which shows that if the plaintiff makes an alternative case, neither alternative must be opposed to the interests of those whom he assumes to represent.

(t) *Doyle v. Muntz*, 5 Ha. 509.

(u) *Ib. sed quare.*

(x) *Forrest v. Manchester, &c., Rail. Co.*, 4 De G. F. & J. 126. See, also, *Hare v. London and North Western Rail. Co.*, 1 J. & H. 252, and *Thomas v. Hobler*, 4 De G. F. & J. 199. The rule does not apply to a nominee of a rival company, who does not assume to represent others; *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. D. 92.

(y) *Robson v. Dodds*, 8 Eq. 301.

(z) *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337; *Seaton v. Grant*, 2 Ch. 459. See further, on this subject, *Orr v. Glasgow, &c., Rail. Co.*, 3 McQu. 799; *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662.

behalf of himself and others was not sustainable unless the injury of which he complained was such as to give him and them a right to sue jointly; and that where persons having no previous connection with each other had been induced to subscribe to a loan or for shares in a company by fraud, a suit by one of them on behalf of himself and others to obtain a return of their subscriptions could not be sustained (a). But later cases have gone further and allowed such actions on the ground that the subscribers to a company have such a community of interest in the funds subscribed as to entitle them all to sue for their return (b). Practically this point is not now of much importance, owing to the modern rule as to misjoinder (c) and joinder of plaintiffs (d).

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Actions for
recovery of
subscriptions
in cases of
fraud.

An action by one or more persons on behalf of themselves and others may be instituted without the consent of such others (e); and even against their consent if the object of the action is to prevent or obtain redress in respect of an illegal act (f). But an action by one or more on behalf, &c., is the action of those who are named on the record as plaintiffs, and whatever is a defence as against them is a defence to the action, whatever might have been the case if other persons had been plaintiffs on the record (g).

Further observa-
tions on actions
by some on
behalf, &c.

(a) *Jones v. Garcia del Rio*, Turn. & Russ. 297; *Croskey v. Bank of Wales*, 4 Giff. 314. See, also, *Hallows v. Fernie*, 3 Ch. 467.

(b) See *Beeching v. Lloyd*, 3 Drew. 227, which, although prior to *Croskey v. Bank of Wales*, was not cited in it. See, also, *Moseley v. Cressey's Co.*, 1 Eq. 405, a suit for the return of deposits.

(c) See *infra*, p. 768.

(d) Ord. XVI., r. 1. Persons induced by a false or fraudulent prospectus to subscribe for shares may join as co-plaintiffs in an action to recover damages, but each must prove his own case. See *Arnison v. Smith*, 41 Ch. D. 98, and *ib.* 348; *Dringbier v. Wood* [1899], 1 Ch. 393; *Frankenburg v. Great Horseless*

Carriage Co. [1900], 1 Q. B. 504.

(e) *Burt v. British Nation Assur. Co.*, 5 Jur. N. S. 555, affirmed on appeal, 4 De G. & J. 158; *Williams v. Salmond*, 2 K. & J. 463.

(f) *White v. Carmarthen Rail. Co.*, 1 Hem. & M. 786. See, also, *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337. Compare *Lund v. Blanchard*, 4 Ha. 299. As to defendants, see *ante*, p. 764, note (f).

(g) *Burt v. British Nation Assur. Co.*, *ubi supra*, where the plaintiff was held barred by his own acquiescence in the matters complained of. See, too, *Scarth v. Chadwick*, 14 Jur. 300, where the defendants got rid of the suit by paying the plaintiff all that he was entitled to.

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Misjoinder of
plaintiffs.

Formerly, if a bill was filed by some on behalf of themselves and others, and it turned out that any of the persons thus included as plaintiffs had no right to sue, or had interests conflicting with that of the plaintiffs on the record, the bill was dismissed (*h*); but now the Court has power to grant relief and to modify its judgment or order according to the special circumstance of the case, and for that purpose to direct amendments, and to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants to the action, and the remaining plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record (*i*). Accordingly, if an action is brought by one shareholder on behalf of himself and others, and it appears that the interest of some of the persons thus represented is different from that of the plaintiff, the action may nevertheless be sustained (*k*).

Frame of action
by some on
behalf, &c.

When an action is brought by some shareholders on behalf of themselves and others, it should appear in the statement of claim (1), that the plaintiffs are shareholders (*l*); and (2), that they are suing on behalf of themselves and others (*m*). If this last does not appear, the action will be treated as that of the ostensible plaintiffs alone (*n*).

Costs.

Where an action is instituted by one member of a company on behalf of himself and others for the protection of the funds of the company and the action is successful, the plaintiffs are only entitled to their costs as between party and party, although in one sense the funds out of which those costs are to be paid belong to the plaintiffs themselves (*o*).

Accounts.

Accounts taken in an action by one shareholder on behalf of himself and others bind all of them (*p*).

(*h*) In *Spittal v. Smith*, Taml. 45, the bill was dismissed as to some of the plaintiffs only.

(*i*) See Ord. XVI., r. 11.

(*k*) *Watson v. Cave*, 17 Ch. D. 19; *Hallows v. Fernie*, 3 Ch. 467; *Jones v. Rose*, 4 Ha. 52. See, too, *Clements v. Bowes*, 1 Drew. 684; *Sturge v. The Eastern Union Rail. Co.*, 7 De G. M. & G. 180, 181.

(*l*) *Banks v. Parker*, 16 Sim. 176; *Walburn v. Ingilby*, 1 M. & K. 61.

(*m*) The class on whose behalf they sue should be clearly described; *Marshall v. South Staffordshire Tram. Co.* [1895], 2 Ch. 36.

(*n*) *Baldwin v. Lawrence*, 2 Sim. & Stu. 18; *Cooper v. Powis*, 3 De G. & S. 688.

(*o*) *Morgan v. Great Eastern Rail. Co.*, 1 Hem. & M. 560. In debenture-holders' actions, see *ante*, p. 340.

(*p*) See *Singleton v. Selwyn*, 9 Jur. N. S. 1149.

No member of a class which purports to be represented by the plaintiff can appeal against an order made in the plaintiff's favour; his proper course if dissatisfied with the order is to make an application to the Court below to be added as a defendant to the action and then to apply to get rid of the order or to obtain the conduct of the action (*q*). If the decision of the Court of first instance is against the plaintiff, it would seem that any member of the class represented by him may obtain leave to appeal on an *ex parte* application to the Court of Appeal (*r*).

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Appeal.

Where a company is incorporated, and its directors or some shareholders have done or are doing that which other shareholders desire to bring an action to redress or prevent, the following rules are to be observed:—

Where company
is incorporated.

1. If the matter complained of is one which gives a right of action to the company as a collective whole, the company ought to sue in its corporate name, and an action by one member on behalf of himself and others is improper (*s*): but leave may be given to add the company as a co-plaintiff (*t*).

2. Again, if the complaint relates to some matter of internal management as to which a majority is competent to decide, the action should be brought by the majority in the name of the company (*u*).

3. But if those who have the management of the affairs of the company will not bring an action in its name when the shareholders require it, having a right so to do, or if directors or shareholders have done or are about to do that which is a fraud on the minority (*v*) or is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others, or in the last case by a member suing alone (*x*), may

(*q*) *Watson v. Cave* (No. 1), 17 Ch. D. 19, and see *Wilson v. Church*, 9 Ch. D. 552. *Foss v. Harbottle*, 2 Ha. 461; *Bur-land v. Earle*, Times, 11 Nov. 1901.

(*r*) *Markham v. Markham*, 16 Ch. D. 1. See, too, *Re Securities Insurance Co.* [1894] 2 Ch. 410. (*v*) See *infra*, pp. 772, 779 *et seq.*

(*s*) *Gray v. Lewis*, 8 Ch. 1035; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474. (*x*) *Spokes v. Grosvenor Hotel Co.* [1897], 2 Q. B. 124; *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474 at p. 481; *Hoole v. Great Western Railway Co.*, 3 Ch. 262.

(*t*) *Duckett v. Gover*, 6 Ch. D. 82. (*u*) *MacDougall v. Gardiner*, 1 Ch. D. 13; *Mozley v. Alston*, 1 Ph. 790;

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Instances of
such actions.

be sustained, for otherwise the dissentients would be without redress (y). And a clause in the articles of association imposing any penalty on a shareholder for bringing such an action against the company is void (z). In suits thus constituted, the Court has compelled directors to account for monies improperly applied (a) or received by them (aa); has declared them guilty of a breach of duty (b), and made them account for profits derived from a breach of duty (c); has declared resolutions fraudulent and void (d); has restrained the carrying out of agreements under the seal of the company (e); restrained the payment of dividends in bonds instead of in cash (f); restrained the application of the funds of a company to unauthorised purposes (g), e.g., defraying the expense of applications to Parliament (h); subscribing to a strike fund (i); restrained a company from purchasing its own shares (k); restrained the construction of part of a railway instead of the whole of it (l); restrained the improper declaration of dividends (m);

(y) See the last three notes, *Mason v. Harris*, 11 Ch. D. 97, and the cases *infra*.

(z) *Hope v. International Financial Society*, 4 Ch. D. 327.

(a) *Bryson v. Warwick Canal Co.*, 4 De G. M. & G. 711.

(aa) *Burland v. Earle*, Times, 11 Nov. 1901.

(b) *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56.

(c) *Shaw v. Holland* [1900], 2 Ch. 305.

(d) *Preston v. Grand Collier Dock Co.*, 11 Sim. 327.

(e) *Maunsell v. Midland Great Western (Ireland) Rail. Co.*, 1 Hem. & M. 130.

(f) *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 636.

(g) *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349; *Smith v. Duke of Manchester*, 24 Ch. D. 611; *Tomkinson v. South-Eastern Rail. Co.*, 35 Ch. D. 675; *Studdert v. Grosvenor*, 33 Ch. D. 528; *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1;

Sulomons v. Laing, 12 Beav. 339 and 377; *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Bagshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lancas. Rail. Co.*, 3 K. & J. 50.

(h) See the last two cases, and *Lyde v. East. Bengal Rail. Co.*, 36 Beav. 10.

(i) *Warburton v. Huddersfield Industrial Society* [1892], 1 Q. B. 817.

(k) *Hope v. International Financial Society*, 4 Ch. D. 327.

(l) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Hodgson v. Powis*, 12 Beav. 392 and 529, and 1 De G. M. & G. 6.

(m) *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337; *Hoole v. Great Western Rail. Co.*, ib. 262; *Dumfrie v. Birkenhead, &c., Rail. Co.*, 12 Beav. 444; *Carlisle v. South-Eastern Rail. Co.*, 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606. As to actions to restrain the payment of dividends actually declared, see *infra*, p. 774.

set aside an improper forfeiture of shares (*n*); restrained the transfer of the business of one company to another company (*o*); set aside agreements for such transfer (*p*); set aside fraudulent purchases (*q*); restrained loans to directors (*r*); restrained a division of assets amongst a majority of members to the exclusion of the rest (*s*); made a declaration as to the rights of preference shareholders (*t*). The Court has also entertained actions in this form to restrain a proposed reduction of capital (*u*), to make directors pay damages to the company for a conspiracy to defraud it (*x*), and to restrain a proposed issue of preference shares (*y*).

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An action by one member on behalf of himself and others may even be maintainable, where an action with like objects would fail if instituted by the company in its corporate capacity; *e.g.*, where the complaint is of fraud imputable to the company as a body, but not imputable to the members individually (*z*).

In such cases as the foregoing, the company, as such, is a proper party, because it is the company, as such, which is sought to be affected by the judgment of the Court (*a*); and the directors individually are proper parties, because they are the persons to be affected in the first instance, and some judgment against them personally is also usually necessary. If, however, a judgment against the company is all that is required, there is no necessity to make the directors parties

Company and
directors proper
parties in such
cases.

(*n*) *Sweny v. Smith*, 7 Eq. 324.

(*o*) *Beman v. Rufford*, 1 Sim. N. S. 550; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Hare v. London and N.-W. Rail. Co.*, 1 J. & H. 252, which shows that the company which has agreed to take the business ought to be a party.

(*p*) *Clinch v. Financial Corp.*, 5 Eq. 450, and 4 Ch. 117.

(*q*) *Atwood v. Merryweather*, 5 Eq. 464, note.

(*r*) *Bluck v. Mallalue*, 27 Beav. 398.

(*s*) *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350.

(*t*) *Staples v. Eastman Photographic Co.* [1896], 2 Ch. 303. In this case, and in that in the next note, the plaintiff sued on behalf of himself and all other preference shareholders.

(*u*) *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287.

(*x*) *Spokes v. Grosvenor Hotel Co.* [1897], 2 Q. B. 124.

(*y*) *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361.

(*z*) See the observations of Lord Cottenham in *Vigers v. Pike*, 8 Cl. & Fin. 647, 648.

(*a*) See *Bagshaw v. The Eastern Union Rail. Co.*, 7 Ha. 114.

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individually (b). In a recent case a shareholder, suing on behalf of himself and other shareholders, brought an action alleging a conspiracy by the directors and others to defraud the company, and claiming damages to be paid by them to the company, and made the company a defendant to the action. The Court held that the company was a necessary party to the action, though no relief was claimed by it, and ordered it to make discovery of documents (c).

Actions by some
on behalf to control
a majority.

The cases above referred to show that it is competent for one shareholder to institute an action on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; moreover, an action in this form is sustainable to prevent or set aside a transaction which is a fraud by a majority on a minority (d); but Courts will not interfere in actions so constituted, if the relief sought is in respect of acts the legality or illegality of which depends on the voice of a majority of the shareholders, who are not themselves chargeable with fraud or improper conduct (e). If such last-mentioned acts are sanctioned by the majority, the Court cannot interfere at all, and if they are not so sanctioned, the majority should themselves apply to the Court, and institute proceedings in the name of the company (f). If it is thought necessary to bring an action before the views of the majority are known, or if the majority are too indifferent to take any proceedings to enforce obedience to their own resolutions, the proper course to be taken by those who determine to appeal to the Court is to take upon themselves the responsibility of bringing an action in the

Using name of
company.

(b) *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & Sm. 562, an action to restrain a company from in effect transferring its business.

(c) *Spokes v. Grosvenor Hotel Co.* [1897], 2 Q. B. 124.

(d) *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. p. 69, where the directors were charged with a breach of duty, and had a majority of votes; *Burland v. Earle*, Times, 11 Nov. 1901; *Atwool v. Merryweather*, 5 Eq. 464, note; *Menier v.*

Hooper's Telegraph Co., 9 Ch. 350; *Mason v. Harris*, Ch. D. 97.

(e) See the next section, and *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474; *Browne v. The Monmouthshire Rail. and Canal Co.*, 13 Beav. 32; *Stevens v. The South Devon Rail. Co.*, 9 Ha. 313.

(f) *Burland v. Earle*, Times, 11 Nov. 1901; *MacDougall v. Gardiner*, 1 Ch. D. 13; *Mozley v. Alston*, 1 Ph. 790.

name of the company. Such an action will not be stayed unless it appears that the majority disapprove it (*g*); if, however, the majority disapprove the action they should apply to the Court to strike out the name of the company as plaintiff (*h*). The application should be made in the name of the company, and served on the defendants and on the solicitor who issued the writ, if an order that he pay the costs is asked for (*i*). If it appears that the name of the company has been used without authority, the solicitor who so used it will be ordered to pay the costs of the plaintiff company as between solicitor and client, and of the defendants as between party and party (*k*). If the company is not the sole plaintiff, and the other plaintiff has authorised the action to be brought, the Court may order him to pay the costs (*l*), though it seems that even in this case the solicitor may be ordered to pay them (*m*). If the solicitor had authority to use the name of the company, but such authority has been revoked, he will only be ordered to pay the costs from the time of the revocation; or if such revocation was caused by the dissolution of the company, from the time when he knew, or with due diligence ought to have known, of the dissolution (*n*).

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Using name of
company without
authority.

Moreover, if there are conflicting interests, care must be taken to have each separate interest substantially represented by some person who is a party to the action (*o*). Therefore,

Conflicting
interests.

Actions to
restrain calls.

(*g*) *The Exeter and Crediton Rail. Co. v. Buller*, 5 Ra. Ca. 211, where the bill was filed in the name of the company, although the defendants had possession of the seal. See, also, *East Pant Du, &c., Mining Co. v. Merryweather*, 2 Hem. & M. 254; *Atwool v. Merryweather*, 5 Eq. 464, note; *Pender v. Lushington*, 6 Ch. D. 70 as to the time for ascertaining the majority, see *ib.* pp. 79, 80; *Harben v. Phillips*, 23 *ib.* 14; *Imperial Hydro-pathic Hotel Co. v. Hampson*, *ib.* 1.

(*h*) *Silber Light Co. v. Silber*, 12 Ch. D. 717, where leave was given to amend and make the company defendants.

(*i*) See cases in the next note.

(*k*) *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310; *John*

Morley Building Co. v. Barras [1891], 2 Ch. 386, both cases of actions between rival sets of directors. See, too, *Fricker v. Van Grutten* [1896], 2 Ch. 649.

(*l*) *La Compagnie de Mayville v. Whitley* [1896], 1 Ch. 788.

(*m*) *Gold Reefs of Western Australia v. Dawson* [1897], 1 Ch. 115; the case in note (*l*) was not cited. The order for costs was made after the action had been discontinued.

(*n*) *Salton v. New Beeston Cycle Co.* [1900], 1 Ch. 43.

(*o*) *Cramer v. Bird*, 6 Eq. 143; *Hoole v. Great Western Rail. Co.*, 2 Ch. 262; *Fraser v. Cooper, Hall & Co.*, 21 Ch. D. 718 (an action by a bondholder on behalf of himself and other bondholders).

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Actions to
restrain pay-
ment of divi-
dends.

where there is a dispute about a call which some shareholders have paid and others have not, those who have not paid cannot sustain an action on behalf of themselves and those who have paid, against the directors, trustees, and secretary of the company, for a general account of the company's debts and assets, and to have the property of the concern applied in discharge of its liabilities. To an action with such objects, some at least of the class of shareholders who have paid the call ought to be made parties (*p*). Again, with respect to actions to restrain the improper payment of a dividend, it is to be remembered that the declaration of a dividend confers on each shareholder a legal title to his share of it; and, consequently, even although the dividend may have been improperly declared, payment of it will not be restrained in an action by one shareholder against the company and its directors only. On these grounds, in *Carlisle v. South-Eastern Railway Company*, an injunction to restrain the payment of a dividend already declared was refused, although an injunction to restrain the future declaration of dividends, except out of profits, was granted (*q*).

SECTION II.—OF THE RULE THAT THE COURT WILL NOT INTERFERE IN MATTERS OF INTERNAL REGULATION.

Internal ma-
nagement of
companies.

Where an application is made to a Court to assist one or more shareholders against others or against the managing body, the first matter to be considered is, whether the rights which the complainants seek to enforce do or do not depend on the views which may be taken by the majority of the shareholders (*r*). The Court will interfere to prevent the violation of rights which do not depend on the views of other

(*p*) See *Richardson v. Larpent*, 2 Y. & C. C. C. 507; *Lovell v. Andrew*, 15 Sm. 581; *Sharpe v. Day*, 1 Ph. 771; *Lund v. Blanshard*, 4 Ha. 9. If the plaintiff does not know who they are, see *Hodgkinson v. National Live Stock Insurance Co.*, 26 Beav. 473, and *De G. & J.* 422.

(*q*) *Carlisle v. South-Eastern Rail.*

Co., 1 Mac. & G. 689. See, also, *Fawcett v. Laurie*, 1 Dr. & Sm. 192. Compare *Hoole v. Great Western Rail. Co.*, 3 Ch. 262, where one of the defendants was held sufficiently to represent others in the same interest.

(*r*) As to the powers of majorities, see *ante*, Bk. III. ch. 1, § 4.

shareholders (s); but, as a general rule, the Court will not interfere between members of companies for the purpose of enforcing alleged rights arising out of matters which are properly the subject of internal regulation (t). It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which it is illegal even for a majority to do, or which is a fraud on the minority (u); and it follows from this, that the Court will not interfere in matters properly the subject of internal management until all reasonable attempts have been made to take the sense of the general body of members on the matters in question; nor even then unless it is called upon to interfere to give effect to the will of the majority against a factious minority. In a recent case an injunction was granted to restrain a company from holding a meeting to confirm a special resolution on the ground that the original resolution was passed by an insufficient majority. It is to be observed that unless the original resolution was duly passed, the majority could not, by confirming it, make it a valid special resolution (v).

The leading decisions on this subject are *Carlen v. Drury*, *Foss v. Harbottle*, and *Mozley v. Alston*, which will serve to illustrate the application of the principle in question, as well to unincorporated as to incorporated companies.

In *Carlen v. Drury* (x), a large number of persons were partners in a concern called *The Bankside Brewery*, and six of them, on behalf of themselves and co-partners, filed a bill against the managers and others, alleging circumstances of gross mismanagement and neglect on the part of the managers,

Complaints
against remov-
able directors.
Carlen v.
Drury.

(s) See *infra*, p. 780, &c., and the instances on p. 770.

(t) See *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. p. 69, where it was said that a breach of duty by directors who held a majority of votes was not a matter of mere internal management.

(u) As to this, see *infra*, pp. 779, 781.

(v) *Young v. South African Syndicate* [1896], 2 Ch. 268; compare *infra*, p. 806, note (q). It is now

settled that in the absence of fraud the declaration of the chairman that the resolution has been passed is, in these cases, conclusive, see *Comp. Act, 1862, § 51, Arnot v. United African Lands, Ltd.* [1901] 1 Ch. 318, and *ante*, p. 428.

(x) 1 V. & B. 154. See, also, *Waters v. Taylor*, 15 Ves. 10; *Ellison v. Bignold*, 2 Jac. & W. 503; *Beaumont v. Meredith*, 3 V. & B. 180; *Miles v. Thomas*, 9 Sim. 606.

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and praying for an account, a dissolution, and a receiver. It appeared that by the company's deed of settlement, the managers might be removed at any general meeting; that general meetings were to be held at Lady-day and Michaelmas, or within a month after, at such place as the managers should appoint; that a committee of twelve persons should be annually elected for auditing accounts, and advising the managers; that if the managers should misbehave themselves, this committee, or any seven of them, should have the power of calling a special general meeting of shareholders to report thereon; and that no dissolution should be made without the consent of a majority of three-fourths of the shareholders at a general meeting. A motion for an injunction and a receiver was refused with costs, the Court not being satisfied that the means of redress provided by the parties themselves in the articles were not effectual, and being of opinion that the plaintiffs had a remedy in their own hands to which they had not resorted. From the judgment of Lord Eldon, it appears that the Court would, if necessary, have compelled the managers to call meetings; that in a case of delinquency clearly made out the Court would have acted without hesitation; but that there must have been a positive necessity for the interference of the Court arising from the refusal or neglect of the committee to act; and that the Court would not interfere before the parties had tried that jurisdiction which the articles had themselves provided.

Alleged fraud
and misconduct.
Foss v. Har-
bottle.

In *Foss v. Harbottle* (y), two members of an incorporated company, called *The Victoria Park Company*, filed a bill against the directors and others, charging them with a variety of fraudulent and illegal acts, whereby the property of the company was misapplied, aliened, and wasted, and praying that the defendants might make good to the company the losses sustained by the acts complained of, and that a receiver might be appointed to apply the property of the company in

(y) 2 Ha. 461. Compare *Atwood v. Merryweather*, 5 Eq. 464, n., which was also a case of fraud, but a majority of the shareholders excluding the defendants supported the bill; and *Alexander v. Automatic Tele-*

phone Co. [1900], 2 Ch. 56, where the directors against whom the action was brought for a breach of duty held a majority of the votes. Fraud was charged, but was disproved.

discharge of its liabilities, and to secure the surplus. The general result of the Act incorporating the company was (in the opinion of the Court) to make the directors the governing body, subject to the superior control of the proprietors, who, when assembled in general meeting, had power to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they might have originated. The Court was of opinion that the acts of the defendants complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it did not appear that any attempt had been made to bring those acts before a general meeting of the shareholders; and that under those circumstances, the Court could not interfere at the suit of a minority, whatever it might have been induced to do if proper means had been resorted to and found ineffectual to set the general body of shareholders in motion.

In *Mozley v. Alston* (z), a bill was filed by two shareholders of a railway company against the company and its directors, alleging that the latter had been illegally appointed; that they had possession of the seal of the corporation; and that they were about to use it for various improper purposes. The bill prayed that the directors who were defendants might be restrained from acting as directors, and be ordered to place the seal, and the books and documents of the company, under the control of its lawful directors. It appeared from the statements of the bill that a majority of the shareholders agreed with the plaintiffs in their view of the illegality of the defendants' appointment, and the Court held that, if that were so, there was nothing to prevent the company from filing a bill in its corporate character to remedy the alleged evils; and that as the plaintiffs showed no reason to justify them alone in applying to the Court for redress, they were not entitled to its assistance.

These cases have been followed by a variety of others (a). One of the most characteristic of this class is perhaps *Bailey*

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Directors improperly appointed.
Mozley v. Alston.

(z) 1 Ph. 790. Compare *Atwood* succeeded.

v. *Merryweather*, 5 Eq. 464, note, where the votes of the defendant turned the scale, and the suit

(a) See, in addition to those mentioned in the text, *Edwards v. The Shrewsbury and Birmingham*

Bailey v. Birkenhead, &c., Railway Company.

Bk. III. Chap. 9. v. *The Birkenhead, Lancashire, and Cheshire Junction Railway*
Sect. 2.

Company (b), where a bill was filed by one of a set of shareholders in an amalgamated company, alleging that an unfair and unnecessary call had been made upon that set, and seeking to restrain proceedings to enforce payment of the call. Lord Langdale thought that the case could only be considered as an attempt to induce the Court to interfere in the internal management of the affairs of a company, and to take upon itself to determine a question which might and ought to be determined by the shareholders themselves at general meetings.

Orr v. Glasgow
Railway Com-
pany.

So, in the Scotch case of *Orr v. Glasgow, &c., Railway Company* (c), a suit was instituted against a railway company and its directors, seeking redress on the ground that the directors were also directors of a rival company, and were acting in the interests of that company to the prejudice of the shareholders in the first company. The specific relief sought was, that certain calls might be set aside, and that monies already paid, for calls previously made, might be returned; but the suit was dismissed, on the ground that although the acts of the directors were beyond their powers, it was competent to the shareholders to ratify and adopt those acts, and the suit was not instituted for the protection of the majority of shareholders.

MacDougall v.
Gardiner.

Again, in *MacDougall v. Gardiner* (d), the Court was asked to restrain directors from carrying out certain arrangements without submitting them to the shareholders and to compel the directors to call a meeting. The shareholders had themselves power to call a meeting, and it did not appear that a

Rail. Co., 2 De G. & Sm. 537; *Yetts v. The Norfolk Rail. Co.*, 3 ib. 293; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216; and the cases dealing with disputes between members of a club. See *Fisher v. Keane*, 11 Ch. D. 353; *Labouchere v. Wharnccliffe*, 13 ib. 346; *Dawkins v. Antrobus*, 17 ib. 615; *Baird v. Wells*, 44 Ch. D. 661.

(b) 12 Beav. 433.

(c) 3 MacQu. 799. Compare

Hodgkinson v. National Live Stock Insurance Co., 26 Beav. 473, and 4 De G. & J. 422, where, however, relief was sought in respect of other matters than the call.

(d) 10 Ch. 606, and 1 Ch. D. 13. The decision of V.-C. Malins, in 20 Eq. 383, was reversed, and the previous decisions of the same judge in *Featherstone v. Cooke*, 16 Eq. 296, and *Trade Auxiliary Co. v. Vickers*, ib., can hardly be relied upon.

majority of the shareholders could not control the directors without the assistance of the Court, which was therefore refused.

Other instances will be referred to hereafter when treating of injunctions.

In such cases as these, those who complain of the managing body should, before appealing to the Court, endeavour to bring their grievances before their fellow-shareholders, and ascertain what the views of the majority are (e). The Court will not prevent the holding of a meeting simply because the notice convening it may invite it to exceed its powers (f). If the majority disapprove the conduct complained of, they can sue in the name of the company, and so obtain redress (g); or if the defendants prevent that course by turning the scale of votes, an action by one shareholder on behalf of himself and others may be supported (h). If, however, the majority, acting *bonâ fide*, agree with and sanction the course adopted or proposed to be adopted by the managing body, and if that course is not illegal if approved by the majority, the Court clearly cannot interfere. But if that course will be a fraud on the minority, or illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the Court will interfere at the suit of that single dissentient shareholder, and protect him and his interests: and in such a case it is not essential that he should appeal to the other shareholders before applying to the Court (i).

(e) See the foregoing cases.

(f) *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320. Compare *Jackson v. Munster Bank*, 13 L. R. Ir. 118.

(g) See the observations in *Foss v. Harbottle*, and *Mozley v. Alston* and *MacDougall v. Gardiner*, 1 Ch. D. 13, above referred to. As to using the name of the company at the risk of a stay of proceedings, see *ante*, p. 773.

(h) See *Atwool v. Merryweather*, 5 Eq. 464, where a bill by one shareholder on behalf of himself and others, was ultimately successful;

although a bill by the company had been taken off the file. *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56, where no meeting had been held. See, too, *Shaw v. Holland* [1900], 2 Ch. 305, where the circumstances are not stated, and *Spokes v. Grosvenor, &c., Hotel Co.* [1897], 2 Q. B. 124.

(i) See *Gregory v. Patchett*, 33 Beav. 595; *Atwool v. Merryweather*, 5 Eq. 464; *Mason v. Harris*, 11 Ch. D. 97; *Tomkinson v. South-Eastern Rail. Co.*, 35 Ch. D. 675; *Warburton v. Huddersfield Industrial Society* [1892], 1 Q. B. 817. See, too,

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Course to be
taken by
minority.

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Majority not
interfered with
if they are not
doing what is
illegal.

Lord v. Copper
Miners' Com-
pany.

Otherwise if it
is doing what
is illegal.

Adley v. The
Whitstable
Company.

Preston v. Grand
Collier Dock
Company.

As an illustration of the proposition that the majority cannot be interfered with if they are not doing what it is illegal for them to do or what is a fraud on the minority, reference may be made to the case of *Lord v. The Governor and Company of Copper Miners in England* (k), where a shareholder in an incorporated mining company filed a bill to restrain the governing body from vesting the property of the company in trustees for the benefit of its creditors. Lord Cottenham (reversing the decision of V.-C. Knight Bruce) allowed a demurrer to the bill, on the ground that it was competent for a majority of shareholders to sanction such a proceeding, and that it appeared that in fact they had sanctioned it.

The important principle that one out of any number of shareholders is entitled to the protection of the Court against the illegal acts of the others (l), although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in *Natusch v. Irving* (m) and *Const v. Harris* (n), which were cases of unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by Act of Parliament, charter, letters patent, or registration.

Thus, in *Adley v. The Whitstable Company* (o), Lord Eldon restored a member of a company incorporated by Act of Parliament, to rights from which he had been unlawfully excluded under colour of a bye-law of the company.

In *Preston v. The Grand Collier Dock Company* (p), the Vice-Chancellor of England overruled a demurrer to a bill, the object of which was to set aside an arrangement on the ground of fraud, and to compel certain shareholders to pay calls, although it had been in effect unanimously resolved at

per Chitty, J., in *Floating Dock Co. of St. Thomas* [1895], 1 Ch. p. 698. The contrary receives some countenance from, but is not really warranted by, *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & S. 537.

(k) 2 Ph. 740. See, too, *Gregory v. Patchett*, 33 Beav. 595; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49; *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 219; *Inderwick v. Snell*, 2 Mac. &

G. 216, where directors complained that they had been wrongfully removed.

(l) I.e., illegal, although sanctioned by a majority.

(m) Gow. on Partn. App. 398.

(n) T. & R. 518, 519.

(o) 17 Ves. 315, and 19 ib. 304, and 1 Mer. 107, where a decree for an account of profits was made.

(p) 11 Sim. 327.

a special general meeting of the company that no calls should be made upon them. So in *Beman v. Rufford* (q), the Court, at the suit of a small minority of shareholders in a railway company, restrained what in effect would have been a transfer of the business of that company to another company, although the great majority of shareholders in the former were desirous that such transfer should be made. So the Court has interfered to prevent an improper payment of dividends (r); and to prevent a payment of dividends in shares (s), or bonds (t); and to protect the preference shareholders in a company against the directors and other shareholders, who intended to make an illegal apportionment of dividends (u). Upon the same principle, the Court has over and over again interfered, at the instance of a minority of shareholders, to prevent an application of the funds of companies to purposes foreign to those to attain which alone such companies were formed (x).

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Beman v.
Rufford.

Other instances.

Where a fraud on a company or a breach of duty by its directors is complained of by a minority only of its shareholders, considerable difficulty arises; for a transaction which is a fraud on the company may be repudiated or adopted by it at its option, and a breach of duty by its directors may be waived or condoned by it. Hence, if a majority of the shareholders not implicated in the fraud or the breach of duty, *bonâ fide*, elect to ratify or sanction the transaction which they might, if they chose, repudiate, it seems that the Court will not interfere at the instance of the minority (y); but if the fraud is a fraud by the majority upon the minority, or the

Frauds sanctioned by a majority.

(q) 1 Sim. N. S. 550. See, too, *Winch v. The Birkenhead, &c., Rail. Co.*, 5 De G. & Sm. 562; *Salomons v. Laing*, 12 Beav. 377; *Clinch v. Financial Corporation*, 5 Eq. 450, and 4 Ch. 117.

(r) *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337.

(s) *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

(t) *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 636.

(u) *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J.

606; *Staples v. Eastman Photographic, &c., Co.* [1896], 2 Ch. 303. See, too, *Carlisle v. The South-Eastern Rail. Co.*, 1 Mac. & G. 689, and on the rights of preference shareholders, *ante*, p. 607.

(x) See *infra*, under the head Injunction, where the cases will be found collected; and *ante*, p. 770.

(y) See *Foss v. Harbottle* and *Mozley v. Alston*, *ubi supra*, and per Wood, V.-C., in *Clinch v. Financial Corp.*, 5 Eq. 482.

Bk. III. Chap. 9. directors whose conduct is impeached hold a majority of votes,
Sect. 3. — the Court will protect such minority (z).

Factionous
minority.

Mozley v.
Alston.

After the foregoing remarks, it scarcely requires to be mentioned that the Court will interfere to control a factionous minority which impedes the execution of the lawful resolutions of the majority (a). Nor can *Mozley v. Alston* (b) be considered as inconsistent with this proposition; for, although in that case the Court certainly did refuse to interfere, it was not called upon to do so in a suit properly framed; and it is tolerably clear from the judgment, that if the majority had chosen to institute a suit in the name of the corporation, the Court would have acted very differently (c).

SECTION III.—OF THE RULE THAT THE COURT WILL NOT INTERFERE
AT THE INSTANCE OF PERSONS WHO HAVE BEEN GUILTY OF
LACHES.

Laches a bar to
relief.

A legal right cannot be waived or abandoned except by acts which are equivalent to a release or an agreement or license (d), but a plaintiff who seeks equitable, as distinguished from legal relief, will fail to obtain redress if he has delayed his application so long as to render it unjust to interfere on his behalf (e).

(z) See *Burland v. Earle*, Times, 11 Nov. 1901; *Alexander v. Automatic Telephone Co.* [1900], 2 Ch. 56; *Mason v. Harris*, 11 Ch. D. 97; *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350; *Atwood v. Merryweather*, 5 Eq. 464, n.; and the cases of illegality referred to above.

(a) See *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, in which the Court did so interfere. See, too, *Fraser v. Whalley*, 2 Hem. & M. 10.

(b) 1 Ph. 790, and *ante*, p. 777.

(c) See, also, *MacDougall v. Gardiner*, 1 Ch. D. 13. In *Miles v. Thomas*, 9 Sim. 606, V.-C. Shadwell declined to restrain the sailing of a ship, although it would seem that

the majority of the shareholders of the company to which the ship belonged, were opposed to her sailing on the voyage on which she was about to be sent. The report of this case is, however, obscure, not only as to the facts, but also as to the reasons for the judgment.

(d) *Palmer v. Moore* [1900], A. C. 293, a case of the abandonment of an interest in a gold mine. *Clarke v. Hart*, 6 H. L. C. 633, at p. 656.

(e) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. pp. 239, 240; *Masonic, &c., Ass. Co. v. Sharpe* [1892], 154; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392, *ante*, pp. 484 and 500.

His delay naturally induces others to suppose that he is content, and to act on that supposition; and if he has allowed them to engage in transactions and expose themselves to risks, in the belief that they will alone be the losers in the event of disaster, he will not be able to obtain any share of their gains in the event of success.

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The application of these principles to shareholders, is well illustrated by those cases in which partners and shareholders, whose shares have been forfeited, have been refused relief on the ground of delay (*f*). The following cases further illustrate the application of the principles under other circumstances.

In *Gray v. Chaplin* (*g*), the directors of a canal company made an agreement for letting tolls for ninety-nine years, which agreement was both *ultra vires* and detrimental to the interests of the public. After the agreement had been acted upon for forty-seven years without any complaint being made, a bill was filed by two shareholders on behalf of themselves and the other shareholders to set aside the agreement and for an account. A great majority of the shareholders disavowed the suit, but the Vice-Chancellor held that this was immaterial (*h*), and he made an order for a receiver. Upon appeal, however, from this order, Lord Eldon held, that the plaintiffs could not avail themselves of the interest which the public might have in the matters complained of; and that, whatever relief might be obtained by the Attorney-General on behalf of the public (*i*), the plaintiffs were precluded by their own laches and acquiescence from disturbing the possession of the lessee of the tolls, at all events before the hearing of the cause and in the absence of the Attorney-General to represent the public. The order for the receiver was accordingly discharged. What became of the suit afterwards does not appear, but Lord Eldon's judgment left the plaintiffs small hopes of obtaining a decree.

Setting aside
agreements.
Gray v. Chaplin.

(*f*) See Partn. 469-478, where the cases are collected. Compare *Clegg v. Edmondson*, 8 D. G. M. 787; *Rule v. Jewell*, 18 Ch. D. 660, where laches was a bar, with *Clarke v. Hart*, 6 Ho. Lo. Ca. 633; and *Clements v. Hall*, 1 De G. & J. 173,

where it was not. *Ante*, p. 730.

(*g*) 2 Russ. 126. See, too, *infra*, p. 786, note (*x*).

(*h*) See 2 Sim. & Stu. 267, and 2 Russ. 132, note.

(*i*) See *ante*, p. 377.

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Compelling
completion of
works.

Graham v. Bir-
kenhead Railway
Company.

In *Graham v. The Birkenhead, &c., Railway Company* (k), a suit was instituted by a shareholder in a company to restrain the completion of part only of the company's works. There had been several suits for the same purpose instituted by other shareholders, but for reasons to which it is not material to advert, those suits were never effectually prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not sufficient funds for that purpose. It was also well known that the directors had for some time been completing part of the works. It was held that those who disapproved of the application of the company's funds to that limited extent, ought to have taken proceedings to stop it at once; and that having regard to the laches of the plaintiff he was not entitled to relief.

Making good
breaches of
trust.

Stupart v.
Arrowsmith.

In *Stupart v. Arrowsmith* (l), a suit was instituted by a shareholder in a company against its directors and others for the purpose of compelling them to restore funds of the company alleged to have been illegally applied in buying up shares (m), and for a general account. It appeared, however, that the alleged illegal purchase of shares had not taken place, that the directors had laid accounts before the shareholders showing the amount of the company's receipts and expenditure, and the balance to be divided; that these accounts had been adopted at a general meeting, and that payments had been made to some of the shareholders upon the footing of these accounts. The suit was not instituted until three years after the adoption of the accounts, at the meeting referred to, and it was held that, under these circumstances, and no fraud having been proved, the plaintiff was not entitled to the interference of the Court.

Burt v. British
Nation.

In *Burt v. British Nation Assurance Association* (n) a suit by

(k) 2 Mac. & G. 146, and 12 Beav. 460.

(l) 3 Sm. & G. 176. See, too, *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49; *Gregory v. Patchett*, 33 Beav. 595; *Scott v. Izon*, 34 Beav. 434.

(m) See, as to this, *Erans v. Coventry*, 8 De G. M. & G. 835, and other cases, *ante*, pp. 520 *et seq.*

(n) 4 De G. & J. 158. See, also, *Peek v. Gurney*, 13 Eq. 79; *Hunter v. Stewart*, 4 De G. F. & J. 168.

a director complaining of various improper acts done before he became a director, was dismissed on the ground that for two years he had had the means of knowing what had been done, and had sanctioned what he afterwards sought to impeach.

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Sect. 3.

It has even been held that a person who acquires a share from a former shareholder is precluded from complaining of what his predecessor could not complain of himself (*o*). But this is very questionable (*p*).

Again, a person who seeks to rescind an agreement for misrepresentation or fraud must bring his action within a reasonable time after he has discovered the misrepresentation or fraud (*q*); and this rule applies to actions by companies to rescind contracts into which they have entered (*r*). A contract of sale cannot be rescinded if the property bought cannot be restored. The fact that the property has deteriorated in value is no bar to rescission if justice can be done between the parties by proper allowances and compensation; and in the case of fraud the Court will not regard too closely the hardship which an order for rescission may inflict on the fraudulent party (*s*). On rescission being obtained against the purchaser, interest is not given on the rents or profits received by him (*t*).

Actions for
rescission.

If a person has been induced to purchase shares from the company by fraud, and the shares are subsequently forfeited for non-payment of calls, the fact that the purchaser has taken no steps to rescind the contract will not prevent him from relying upon the fraud as a defence to an action for the calls (*u*).

Where shares
have been
forfeited.

(*o*) *Ffooks v. South-Western Rail. Co.*, 1 Sm. & G. 142; *Peek v. Gurney*, 13 Eq. 79.

(*p*) See *per Fry*, L. J., in *Ashbury v. Watson*, 30 Ch. D. at pp. 379 and 386.

(*q*) *Aaron's Reefs v. Twiss* [1896], A. C. p. 294; *Clough v. Lond. and N.-W. Rail. Co.*, L. R. 7 Ex. 26; *Sharpley v. Louth and East Coast Rail. Co.*, 2 Ch. D. 663. See *ante*, pp. 92 and 107.

(*r*) *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Ca. 1218, *ante*, 497, where a delay of 10 months

was held not fatal. Compare the judgments of Lords Cairns and Blackburn on this point. See, too, *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899], 2 Ch. 392, *ante*, pp. 484 and 500.

(*s*) See cases in the last note. In the *Lagunas*' case fraud was not alleged, otherwise rescission would have been granted. See [1899], 2 Ch. pp. 433, 434, and pp. 460, 461.

(*t*) *Silkstone and Haigh Moor Coal Co. v. Edey* [1900], 1 Ch. 167.

(*u*) *Aaron's Reefs v. Twiss* [1896], A. C. 273.

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It is doubtful whether the principles now under discussion apply to the case of a company seeking relief in respect of a transaction which is *ultra vires* the company (x).

Application of
foregoing prin-
ciples in winding
up companies.

Brotherhood's
case.

Smallcombe's
case.

With respect to companies, by far the most important decisions upon the subject of laches and acquiescence are those in which the foregoing principles were held to be applicable to questions arising in winding up companies; for it is now settled that if a person has retired from a company pursuant to an invalid agreement, which all the shareholders must be considered as having known, and which they have long suffered to remain unimpeached, such person cannot afterwards be placed on the list of contributories (y).

SECTION IV.—OF PARTICULAR ACTIONS.

1. *Actions for specific performance.*

Shareholders and companies seldom sue each other for specific performance, except to enforce contracts to take shares and to obtain indemnity against liabilities.

Specific perform-
ance of agree-
ments to form
company.

An agreement to form a company is one the specific performance of which can hardly ever be decreed. Such an agreement may be perfectly valid and binding, but this is not sufficient to entitle one of the parties to it to a decree for specific performance by the other; for this purpose the agreement must not only be valid, but must also be one which a Court can compel performance of in all essential points; if this is practically impossible, an action for damages, and not for specific performance, is the proper remedy. In *Stocker v. Wedderburn* (z), the plaintiff had obtained a patent, and it was

Stocker v.
Wedderburn.

(x) *Masonic, &c., Ass. Co.* [1892], 1 Ch. p. 168; but as to applications to rectify the register when shares have been improperly surrendered, see *ante*, p. 720, note (u). In *Gray v. Chaplin*, *ante*, p. 783, the action was by a shareholder suing on behalf, &c.

(y) *Brotherhood's case*, 31 Beav. 365, affirmed on appeal, 4 De G. F.

& J. 566, and confirmed by *Evans v. Smallcombe*, L. R. 3 H. L. 249. See, as to these cases, *ante*, pp. 712 *et seq.* See, also, *Hunt's case*, 32 Beav. 387; *Gregory v. Patchett*, 33 ib. 595.

(z) 3 K. & J. 393. See, too, *Marwell v. Port Tennant Co.*, 24 Beav. 495, where, however, there was fraud.

agreed between him and the defendants that a company should be formed by them for the purpose of working the patent; that the plaintiff should assign the patent to the company, give his whole services to it for two years, do his best to improve his invention, and give the company the full benefit of all improvements. Owing to a doubt respecting the validity of the patent, the defendants refused to abide by the agreement, and thereupon the plaintiff filed a bill for specific performance, praying, amongst other things, that the defendants might be decreed to take such steps as might be necessary for the registration and incorporation of the company. To this bill the defendants demurred, and the demurrer was allowed with costs, on the ground that the agreement was one and entire, and that if a decree were made in the plaintiff's favour, the Court could neither compel him to perform his part nor restore the defendants to their original position in case he did not.

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Sect. 4.

Where two companies, having power to amalgamate, have entered into a binding agreement so to do, specific performance of the agreement will be decreed, if its terms are such that a decree for specific performance can practically be enforced. In the *Anglo-Australian Assurance Company v. British Provident Insurance Society (a)*, an agreement by the defendant company to take the assets and liabilities of the plaintiff company, and to indemnify it against its liabilities, was specifically enforced.

Specific performance of agreement to amalgamate.

The question whether a Court will decree the specific performance of an agreement to allot and accept shares in a company, has given rise to some difference of opinion. An ordinary contract for the sale of shares is one which the Court will decree to be specifically performed (*b*), and it is immaterial whether the vendor has or has not other shares which he does not sell, or, in other words, whether he and the purchaser will or will not become co-shareholders. But a contract for the sale of shares by one individual to another, is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company, and Lord Romilly refused to decree specific performance of a contract of this kind, on

Specific performance of agreements to take shares.

(a) 3 Giff. 321, and on appeal, 4 De G. F. & J. 341. (b) *Ante*, p. 686.

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Sect. 4.

the ground that the decree would be ineffectual, as the shares might be transferred immediately after the contract was performed (c). On principle, however, this view cannot be supported, and more recent decisions show that specific performance of such agreements will be enforced (d). It is true that the applicant for shares might sell and transfer his shares as soon as the decree was made, but the decree would nevertheless not be inoperative. If the applicant were the plaintiff, he could not be got rid of; whilst if he were the defendant, he could only retire from the company by transferring his shares to somebody else. The reason therefore which induces the Court to decline to decree specific performance of an agreement for an ordinary partnership at will, is scarcely applicable to such an agreement as that now under consideration. Moreover, nothing is more common than for the promoters of a company to agree to sell property to the company in consideration of a certain number of paid-up shares, and it is certainly difficult to see why such a contract, if valid and binding on both parties, should not be enforced; indeed, there is authority for specific performance in such a case (e). Again, persons who have agreed to take shares in a company, are every day made contributories for the purpose of winding up; and they are so upon the ground that, although they are not actually shareholders, they have entered into an agreement to take shares which is binding upon them. Many of these cases are only intelligible upon the assumption that a contract for the allotment and acceptance of shares is one which a Court ought to enforce.

Defences to
suits for specific
performance
of agreement
to take shares.

In order, however, that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the company should be in existence when the action is brought (f), and that the agreement should be

(c) *Sheffield Gas, &c., Co. v. Harrison*, 17 Beav. 294; *Bluck v. Mal-laluc*, 27 Beav. 398; *Columbine v. Chichester*, 2 Ph. 27. In this last case there were circumstances to show that specific performance was impossible.

(d) *Odessa Tramways Co. v. Men-*

del, 8 Ch. D. 235. See, also, the cases below, where specific performance was refused on other grounds.

(e) See *Fyfe v. Swabey*, 16 Jur. 49, M. R.

(f) *Bowler v. Barberton Development Syndicate* [1897], 1 Q. B. 164.

concluded and binding (*g*), and be untainted by fraud (*h*), or unfairness (*i*), and be capable of being performed by the defendant (*k*), and not involve any breach of trust (*l*), or the performance by either party of obligations the performance of which a Court cannot practically enforce (*m*).

On this head, reference may be made to the instructive case of the *Odessa Tramways Co. v. Mendel* (*n*), where specific performance of an agreement to take shares was decreed, although the defendant alleged that the agreement was part of a scheme between himself and the directors to do that which was really *ultra vires* or a fraud on the shareholders. The scheme alleged was held to be separable, and the defendant was not allowed to avail himself of his own fraud as a reason for not taking the shares he had agreed to take and pay for.

As regards impossibility of performance, it is to be observed that an agreement by A. that B. shall do something, can only be decreed to be specifically performed if the agreement, although in form by A., is in truth an agreement by B. himself, or if B. is bound to do that which it has been agreed he shall do. If B. is not bound, by the agreement or otherwise, to do what A. has agreed he B. shall do, no decree for specific performance can be made against either A. or B. (*o*). These observations apply to agreements made by promoters and others, to be performed by a company; if the company is not bound by the agreement, a decree cannot be made either against the company or against the individuals who entered into the agreement (*p*). If directors agree to allot shares, and

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*Odessa Tram-
ways Co. v.
Mendel.*

Agreements
with promoters
and directors.

(*g*) Which it was not in *Oriental Steam Nav. Co. v. Briggs*, 4 De G. F. & J. 191.

(*h*) Which was not the case in *New Brunswick and Canada Rail. Co. v. Muggeridge*, 4 Drew. 686, and 1 Drew. & Sm. 363; or in *Maxwell v. Port Tennant Co.*, 24 Beav. 495.

(*i*) As to agreements between co-directors, see *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116.

(*k*) *Ferguson v. Wilson*, 2 Ch. 77; *Columbine v. Chichester*, 2 Ph. 27. As to the impossibility of obtaining

registration of transfers, *ante*, pp. 687 and 696.

(*l*) Fry on Spec. Perf. p. 189, ed. 3, and see *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116.

(*m*) *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116; *Stocker v. Wedderburn*, 3 K. & J. 393, *ante*, p. 786.

(*n*) 8 Ch. D. 235.

(*o*) Damages can be obtained, see *Foster v. Wheeler*, 38 Ch. D. 130.

(*p*) *Ellis v. Colman*, 25 Beav. 662.

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the agreement is in point of law the agreement of the company, the directors individually can neither be compelled to perform it nor to compensate the plaintiff for its non-performance (q).

Incomplete
gratuitous
transfers.

Although a Court will decree specific performance of an agreement to sell shares, it will not interfere to compel the completion of a gratuitous and intended, but unperfected transaction. Thus, if a person voluntarily settles shares on others, but does not transfer them, or actually constitute himself a trustee of them, the persons intended to be benefited by the settlement do not acquire any equitable title to the shares enforceable against the settlor or his representatives (r).

Contracts for
indemnity.

The right of settlors of shares to be indemnified against calls and other liabilities has already been considered (Book III., c. 4, § 6), as has also the right of directors and others to be indemnified against liabilities incurred by them in conducting the affairs of their companies (Book III., c. 2, § 3). Those rights are enforced by action, which may or may not assume the form of an action for specific performance. It is unnecessary, however, further to allude to this subject (s).

Debentures.

As to the specific performance of contracts to take or allot debentures, see *ante*, pp. 306 and 307.

Only parties to
agreement can
enforce it.

As a general rule, only those persons who are, by themselves or their agents, parties to an agreement (or who represent them), can enforce it. An agreement between A. and B. cannot be enforced by C., although it may be for his benefit (t). But if the agreement creates a trust for C., he can enforce the trust, and so obtain the benefit of the agreement (u). The application of these principles to cases in which attempts have been made to enforce against companies contracts entered into before

(q) *Ferguson v. Wilson*, 2 Ch. 77.

(r) *Milroy v. Lord*, 8 Jur. N. S. 806, L. J.; and 4 De G. F. & J. 264. See, also, *Nanney v. Morgan*, 37 Ch. D. 346.

(s) See, as to specific performance of contracts to indemnify, *Ranelagh v. Huyes*, 1 Vernon, 190; *Lloyd v. Dimmack*, 7 Ch. D. 398; *Hughes-Hallett v. Indian Mammoth Gold Mining Co.*, 22 Ch. D. 561; *Hobbs*

v. Wayet, 36 Ch. D. 256. Fry Spec. Perf., Part VI., Chap. 10.

(t) *Colyear v. Mulgrave*, 2 Keen, 81; *Empress Engineering Co.*, 16 Ch. D. 125.

(u) As in *Page v. Cox*, 10 Ha. 163; *Touche v. Metropolitan Rail. Co.*, 6 Ch. 671; *Murray v. Flavell*, 25 Ch. D. 89. See, too, *Gregory v. Williams*, 3 Mer. 582; *Dale v. Hamilton*, 2 Ph. 266.

their formation, has been already alluded to (Bk. II., c. 1, § 2, Bk. III. Chap. 9. and c. 2, § 8). Another illustration is afforded by *Bell v. Mexborough* (x), where an unsuccessful attempt was made by a subscriber to an abortive railway company to compel two members of the provisional committee to perform an agreement to take shares and pay for them. The plaintiff was no party to this agreement, and he could not enforce it. His remedy, if any, was for misrepresentation, inducing him to take shares.

2. *Rescission of contract and return of deposits.*

The circumstances under which agreements to take shares can be rescinded and deposits paid on them be recovered, have been already examined (see Bk. I., c. 1, § 3, and c. 3).

With reference to actions to rescind contracts to take shares on the ground of misrepresentation, it is necessary to distinguish companies which are being wound up from companies which are not in that position.

After the winding up of a company has commenced, it is too late for a shareholder to repudiate his shares on the ground of fraud; even although that fraud may in point of law be imputable to the company, and may have been discovered since the winding up commenced. This was decided in *Oakes v. Turquand* (y), and is settled law, and is based upon the ground that such fraud affords no answer to the claims of the creditors of the company.

But where the company is not being wound up, the right of a person who has been induced by the fraud or misrepresentation of the company to take shares in it, to repudiate those shares and to be relieved from them is indisputable; provided, 1, the fraud or misrepresentation of which he complains is proved, and is sufficiently material; and 2, he has not deprived

(x) 5 Ra. Ca. 149, and 10 Jur. 893, and 12 ib. 64, on appeal.

(y) L. R. 2 H. L. 325; *Kent v. Freehold Land Co.*, 3 Ch. 493, reversing S. C. 4 Eq. 588. See *Whiteley's case* [1900], 1 Ch. 365, where a counterclaim for rescission

delivered after the petition to wind up was, under the circumstances, held not to be too late. As to amendments, see *Cocksedge v. Metropolitan Coal Consumers Assoc.*, W.N. 1891, pp. 132 and 148.

1. Companies being wound up.

2. Companies not being wound up.

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Misrepresentation
must be
clearly proved.

*Conybeare v.
New Brunswick,
&c., Company.*

himself of his right of repudiation by his own laches, or by conduct inconsistent with such right (z).

The difficulty in practice is to prove the facts necessary to obtain relief. If there has been no positive misrepresentation and no concealment, making what is stated untrue (a), the circumstance that the plaintiff was in fact misled by what he was told and by documents furnished to him will not entitle him to be relieved from his contract. This is well illustrated by *Conybeare v. New Brunswick and Canada Railway Company* (b). The material facts of this difficult case were shortly as follows:—The company was formed for the purpose of purchasing and carrying on a railway belonging to the St. Andrew's and Quebec Railway Company, and of purchasing all the lands and property of that company, and all the rights of the holders of a certain class of shares (called A. shares) in it. The plaintiff applied for shares in the new company, and was informed by its secretary that the A. shares were entitled to a preferential dividend of 6l. per cent., and that the holder of every A. share was entitled to four acres of land. The secretary also stated that the new company had acquired some thousands of acres of land from the Colonial Government, and that all claims against the company were regularly liquidated every six weeks; and he gave the plaintiff reports from the directors, in which these and other matters, tending to show the prosperity of the company, were stated. The plaintiff was shown, and he examined the statutes of the Colonial Legislature, by which the lands were granted; and he took copies of all those statutes, except one, away with him. That one statute which had been produced to the plaintiff, but which was not amongst those he took away, showed that the title of

(z) *Ante*, pp. 92 and 107.

(a) *Ante*, p. 88; but when there is a duty to disclose, see *ante*, pp. 485–487.

(b) 9 H. L. C. 711, reversing S. C., 1 De G. F. & J. 578, and affirming the decision of V.-C. Stuart in 6 Jur. N. S. 164. See, also, as to the necessity of clearly proving the fraud relied upon, *Robson v. Earl of Devon*, *ante*, p. 100;

Kennedy v. Panama, &c., Mail Co., L. R. 2 Q. B. 580; *Smith v. Chadwick*, 9 App. Ca. 187, and 20 Ch. D. 70, which, however, was not an action for rescission; and as to giving particulars of fraud, *McCreight v. Stevens*, 1 Hurl. & Colt. 454, and R. S. C., Order XIX., r. 6, and cases cited thereunder in the Annual Practice.

the company to the lands depended on the completion of the railway by a certain time. The effect of the statute was correctly stated in the company's articles of association. The plaintiff took shares in the company on the faith of those documents and statements; but having afterwards discovered that the company was greatly in debt, that its affairs were far from prosperous, and its title to the lands was not absolute but liable to forfeiture, insisted on rescinding his contract.

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Sect. 4.

The Vice-Chancellor Stuart and the House of Lords were of opinion that no positive misrepresentation had been made, that no wilful concealment had been practised with reference to the title to the land, and that the plaintiff had not been induced to take the shares upon the faith of that title being indefeasible, and his bill was dismissed by the Lords with costs (c).

Upon the subject of the right to rescind a severable contract in part where it cannot be rescinded in toto the case of *Maturin v. Tredinnick* (d) is very important.

Rescission of
severable con-
tracts.
Maturin v.
Tredinnick.

There the plaintiff had been induced by the fraud of the defendant to purchase from him several shares in several mining companies. Before the plaintiff had discovered the fraud he sold some of the shares in one of the companies. He afterwards filed a bill to rescind the contract as to all the remaining shares. Pending the suit one of the companies in which some of these shares were held, was ordered to be wound up; and the shares in one of the other companies were forfeited for non-payment of calls, but the defendant had full notice of the intended forfeiture. The Vice-Chancellor Wood held, (1,) that the sale of some of the shares before the bill was filed did not disentitle the plaintiff to rescind the contract as to the other shares; and, (2,) that neither the subsequent

(c) The Lords Justices held that the plaintiff was entitled to relief upon the grounds that the title of the company to the land had been represented to him as indefeasible, that he had been put off inquiry by the statements so made to him, and that even if the acquisition of land was not the main inducement of the plaintiff in taking shares, it formed a material ingredient in the

purchase.

(d) 2 New Rep. 514, and 4 ib. 15. In this case the V.-C. is reported to have said that a sale of some shares in one of the companies would have afforded a defence to the suit as to the shares in the other companies. But *qu.* how this is consistent with the relief actually given. See, further, *Curtis's case*, 6 Eq. 455.

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Director selling
his own shares
as unallotted
shares.

Fraud by seller
of shares.

order to wind up one of the companies, nor the subsequent forfeiture of shares, afforded any defence to the suit.

If a director of a company is applied to for unallotted shares, and he transfers to the applicant shares already allotted to himself, the transferee can repudiate the transfer, and recover back what he may have paid for the shares (e).

When a person has been induced by the fraud of some particular shareholder to purchase shares of him, the right of the person defrauded is to rescind the contract of sale, and to throw the shares back on the person from whom he took them, and to be indemnified by him against all losses sustained in consequence of having taken the shares (f). This is apparently the limit of the right of the person defrauded in such a case (g). If the shares have been actually transferred to him, he is not entitled to have the transfer treated as null and void as between himself and the company; nor to restrain the company from making calls upon him whilst he is a shareholder (h). He may be entitled to compel his vendor to accept a re-transfer of the shares, but even this right must, it is conceived, depend upon whether the company is being wound up or not, and upon the power of the directors to refuse to register transfers.

Actions for rescission of contract and for the return of deposits, can also be maintained under other circumstances besides fraud and misrepresentation, as has been already pointed out (Bk. I., c. 1, §§ 2, 3).

Actions for the rescission of contracts with promoters have also been considered (Bk. III., c. 2, § 1).

As to the right of rescission when a person, who has been induced by fraud or misrepresentation to enter into a contract,

(e) *Blake v. Mowatt*, 21 Beav. 603.

(f) See *Stainbank v. Fernley*, 9 Sim. 556, and *Seddon v. Connell*, 10 Sim. 58 & 79, and *Maturin v. Tredinick*, 2 New Rep. 514, and 4 ib. 15, ante, p. 793.

(g) An action for damages will lie, see ante, pp. 92 et seq., and 789, note (o), but this is not so complete a remedy.

(h) *Bloxam v. Metropolitan Cab Co.*, 4 New Rep. 51, is not opposed to this. For although the company was restrained from suing the plaintiff for calls, the plaintiff had not acquired any title to the shares, they having been transferred to him by a person who had himself no title. The transfer was therefore wholly void.

has sold the benefit of the contract, see *ante*, p. 490; and as to the effect of the deterioration of the property on the right of rescission, see *ante*, p. 785. Bk. III. Chap. 9.
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The persons to be made parties to actions for rescission of contract must include the parties to the contract, but since the Judicature Acts, other persons against whom the plaintiff may be entitled to relief may be joined. Parties to
actions for
rescission, &c.

A person who has been induced by the fraud of the defendant to purchase shares from him, is entitled to bring an action for a return of the purchase-money, and for an indemnity, and the only necessary party to such an action is the person who sold the shares (*i*). If the fraud complained of is a fraudulent statement in the prospectus, all persons thereby induced to take shares may join as co-plaintiffs (*k*), but each plaintiff must prove his own case (*l*). Shares purchased
on the faith of
false statements.

Where persons have been induced by fraud to subscribe to a bubble company, each one may institute an action on his own behalf against those who have fraudulently obtained his money, for a return thereof; and in such a case, it is not necessary that the other persons defrauded should be parties to the action, or be represented therein (*m*). An action by one of such persons on behalf of himself and others can, however, also be maintained in these cases (*n*). A member of a chartered company cannot, so long as the charter is not revoked, maintain an action to rescind his agreement to take shares on the ground that the charter was obtained by fraud and that the company was formed by fraud (*o*). Bubble com-
panies.

Chartered
companies.

(*i*) See *Stainbank v. Fernley*, 9 Sim. 556; *Mare v. Malachy*, 1 M. & Cr. 559; *Turner v. Hill*, *Turner v. Tyacke*, *Turner v. Borlase*, 11 Sim. 1, 16, 17. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 289; *Cridland v. De Mauley*, 1 De G. & S. 459.

(*k*) *Arnison v. Smith*, 41 Ch. D. 98, and *ib.* 348, an action for damages, where there were 54 plaintiffs. See, too, *Dringbier v. Wood* [1899], 1 Ch. 393; *Frankenburg v. Great Horseless Carriage Co.* [1900], 1 Q. B. 504, cases under the Directors Liability Act, 1890. (*n*) *Croskey v. Bank of Wales*, 4 Giff. 314; *Cooper v. Webb*, 15 Sim. 454; *Wilson v. Stanhope*, 2 Coll. 629; *Apperley v. Page*, 1 Ph. 779; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684, where demurrers to such bills were overruled. See, too, *Sheppard v. Oxenford*, 1 K. & J. 491, and *Butt v. Monteaux*, 1 K. & J. 98. Compare *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520.

(*l*) See *Arnison v. Smith*, 41 Ch. D. 98. See, too, *ib.* 40 Ch. D. 567. (*o*) *Macbride v. Lindsay*, 9 Ha. 574.

(*m*) *Colt v. Woolluston*, 2 P. W.

8. *Of account and discovery.*

The subject of account and discovery so far as it relates to partnerships and unincorporated companies will be found fully discussed in the author's work on Partnership (*p*).

Actions for an account may be maintained in order to have the assets of abortive companies properly applied (*q*); and in order to compel promoters and directors to make good monies which on principles before explained are monies of the company (*r*). But after a company is ordered to be wound up those questions which were formerly settled in a suit for a dissolution and account are now disposed of under the winding-up order, as will be seen hereafter in Book IV.

Opening
accounts.

As regards opening settled accounts it has been decided that when accounts have been laid before shareholders at a proper meeting, and have been accepted and adopted by them as correct, those accounts cannot be afterwards impeached, except on the ground of fraud or mistake, which must be proved by those who allege it (*s*). Moreover, an account may be a settled account although it may not have been audited as required by the rules of the company (*t*). In connection with this subject the power of a majority of shareholders to bind a minority must be borne in mind; for a minority cannot impeach an account which relates to matters as to which the majority can bind the minority (*u*), and which the majority have assented to with adequate knowledge of the facts.

Discovery.

With respect to discovery the only points to which attention need be called in a treatise like the present are these, viz.:

Persons liable
to be
interrogated.

1. The Court may order interrogatories to be delivered to any member or officer of any company, whether incorporated or not (*x*). *Primâ facie* the secretary is the right person to answer

(*p*) Partn., 493 *et seq.*

(*q*) *Wallworth v. Holt*, 4 M. & Cr. 619; *Sheppard v. Oxenford*, 1 K. & J. 491, and pp. 763 *et seq.*

(*r*) *Ante*, Bk. III., c. 2.

(*s*) See *Holgate v. Shutt*, 27 Ch. D. 111, and 28 ib. 111; *Holmes' case*, 2 D. G. M. & G. 113; *Kent v. Jackson*, ib. 49; *Ex parte Bignold*, 22 Beav.

143; *Stupart v. Arrowsmith*, 3 Sm. & G. 176; *Ex parte Kemp* [1894]. 3 Ch. 690. Compare *Portsmouth Banking Co.*, 2 Eq. 167, as to reports without accounts.

(*t*) *Holgate v. Shutt*, 28 Ch. D. 111.

(*u*) *Ante*, Bk. III., c. 1, § 3.

(*x*) R. S. C., Order XXXI., r. 5.

interrogatories; an ordinary member will not be required to answer interrogatories under this rule unless they relate to matters about which he knows more than the officers of the company (y). An application for leave to interrogate an ordinary member should be served upon him (z).

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2. Officers of the company cannot avoid discovery simply by saying they do not know. They must inquire of those officers or servants of the company who do know (a); and must either consult the books and documents of the company which contain the information sought or produce them for inspection by the person seeking discovery (b), unless such books, &c., are privileged from production. At the same time, they are only bound to answer as to their knowledge acquired in the course of their employment, and as to the result of inquiries made by them of other officers or agents with regard to their knowledge acquired in the same way (c). Their answer is the answer of the company, and can be read against it (c). Directors cannot defeat the Court by forbidding their officer to examine the books (d).

Extent of
obligation
to answer.

3. An order for an affidavit of documents may be made under R. S. C., Ord. XXXI., r. 12, against an officer of a company (e). If the company is a proper party to the action, an order for discovery can be made against it, though no relief is sought against it (f).

Affidavit of
documents.

Books and papers which are in the possession of a company are, for purposes of discovery, in the possession or power of the directors, and they cannot avoid giving a list of the

Directors deny-
ing possession.

(y) *Berkeley v. Standard Discount Co.*, 13 Ch. D. 97; *Alexandra Palace Co.*, 16 Ch. D. 58; *Att.-Gen. v. North Metropolitan Tram. Co.* [1892], 3 Ch. p. 74; and *ante*, p. 379.

(z) *Chaddock v. British South Africa Co.* [1896], 2 Q. B. 153.

(a) *Taylor v. Rundell*, 11 Sim. 391, and Cr. & Ph. 104; *Southwark Water Co. v. Quick*, 3 Q. B. D. 321, *per Cotton*, L. J.; *Bolckow, Vaughan & Co. v. Fisher*, 10 ib. 161. Compare *Rasbotham v. Shropshire Union Canal Co.*, 24 Ch. D. 110.

(b) See *Drake v. Symes*, Johns. 647.

(c) *Welsbach Incandescent, &c., Co. v. New Sunlight, &c., Co.* [1900], 2 Ch. 1. The dicta to the contrary in *Southwark, &c., Water Co. v. Quick*, 3 Q. B. D. p. 321, cannot be relied upon.

(d) *Seddon v. Connell*, 1 Y. & C. C. 128, and 1 Ph. 222.

(e) *Cooke v. Oceanic Steam. Co.*, W. N. (1875) 220.

(f) *Spokes v. Grosvenor, &c., Hotel Co.* [1897], 2 Q. B. 124.

Bk. III. Chap. 9. documents of the company by saying that they, the directors,
Sect. 4. have none (g).

Inspection of
books of cor-
porations.

When an order is made against a company for the inspection of its books, and the directors will not allow them to be produced, an order for their production will be made against the directors personally (h).

The right of the members of a company to inspect and take copies of its accounts and other books and documents, apart from legal proceedings, has been already alluded to, see *ante*, pp. 484 and 615 (i).

4. Of injunctions.

Injunctions
against com-
panies and
their directors.

With respect to injunctions against companies and their directors, little remains to be added to what was said when considering the principles by which Courts are guided in interfering in matters of internal management (k), and in controlling majorities (l). In order, however, to facilitate reference, it will be convenient to collect those cases in which an injunction has been granted or refused, although they may have been noticed in previous pages.

Sequestration.

Injunctions are enforced against a corporation by sequestration (m).

Service of writ
out of
jurisdiction.

Where the company has property within the jurisdiction leave to serve a writ for an injunction out of the jurisdiction may be obtained under Order XI. of the Rules of the Supreme Court in a proper case (n).

Effect of
Judicature Act,
1873, § 25.

In relying upon the authorities here collected, it is to be borne in mind that the circumstances under which the Court will grant an injunction have been extended by the Judicature Act, 1873, § 25 (8) (o). It must also be recollected that before

(g) *Clinch v. Financial Corporation*, 2 Eq. 271.

(h) *Lacharme v. Quartz Rock Mining Co.*, 1 Hurls. & Colt. 134. As to the form of an order for production by a corporation, see *Ranger v. Great Western Rail. Co.*, 4 De G. & J. 74.

(i) See also *infra*, under the heads (4) Injunction, and (6) Mandamus.

(k) *Ante*, pp. 774 *et seq.*

(l) *Ante*, pp. 434 *et seq.*

(m) R. S. C., Order XLII., r. 31.

(n) *Burland's Trade Mark*, 41 Ch. D. 542.

(o) See *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30; *Kitts v. Moore* [1895], 1 Q. B. 253. See, on the construction of this section, the cases collected in the Annual Practice under Order L., r. 6.

the trial of a cause, the Court will not restrain the exercise of a clear legal right, unless the Court is satisfied that it will be compelled to do so at the trial (*p*): nor will it interfere, if it is not in the possession of all the material facts, and convinced that an immediate injunction is imperatively required (*q*). Bk. III. Chap. 9.
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I.—*An injunction has been granted to restrain—*

Injunctions
granted.

1. The registration (*r*) or the continuance on the register (*rr*) of a new company with a name similar to that of an existing one.
2. The carrying on of business under a name calculated to deceive (*s*);
3. The improper insertion or continuance of a person's name on a company's prospectus (*t*) or on the register of shareholders (*u*);
4. The registry of an improper transfer of shares (*x*);
5. The selling or transferring by a company of shares on which it claimed a lien (*y*);
6. The allotment of new shares in a manner infringing the rights of the executors of a deceased shareholder under the company's articles (*z*);
7. The making of calls for illegal purposes (*a*);
8. The making of calls on a shareholder induced to become such by fraud (*b*);

(*p*) *Playfair v. Birmingham, &c., Rail. Co.*, 1 Ra. Ca. 640. As to a company giving the usual undertaking in damages by counsel on obtaining an interim injunction, see *East Molesey Local Board v. Lambeth Waterworks Co.* [1892], 3 Ch. pp. 299, 300, and *ante*, p. 377.

(*q*) *Fielden v. Lancashire, &c., Rail. Co.*, 2 De G. & S. 531.

(*r*) *Tussaud v. Tussaud*, 44 Ch. D. 679; *Hendriks v. Montagu*, 17 Ch. D. 638.

(*rr*) *La Société Anonyme, &c., Levassor v. Punhard, &c., Co., Ld.* [1901] 2 Ch. 513.

(*s*) See case in last note and *North Cheshire, &c., Brewery Co. v. Manchester Brewery Co.* [1899], A. C. 83; *F. Pinet & Cie. v. Maison Louis Pinet, Ld.* [1898], 1 Ch. 179. See form of order, p. 182. Compare *Sunders v. Sun Life Ass. Co. of Canada* [1894], 1 Ch. 537.

(*t*) *Routh v. Webster*, 10 Beav. 561.

(*u*) *Taylor v. Hughes*, 2 Jo. & Lat.

24; *Shortridge v. Bosanquet*, 16 Beav. 84. Compare *Bullock v. Chapman*, 2 De G. & S. 211. This is now usually done by an application to rectify the register, as to which see *ante*, pp. 78 *et seq.* and 165 *et seq.*

(*x*) *Fyfe v. Swaby*, 16 Jur. 49.

(*y*) *Everitt v. Automatic Weighing Machine Co.* [1892], 3 Ch. 507.

(*z*) *James v. Buena Ventura, &c., Syndicate* [1896], 1 Ch. 456.

(*a*) See as to this, *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422, both of which, however, were decided on demurrer. See further on this subject, *Orr v. Glasgow Rail. Co.*, 3 MacQu. 799, and the other cases cited *infra*, under the next head, Nos. 2 to 6.

(*b*) *Smith v. Reese River Co.*, 2 Eq. 264, and L. R. 4 H. L. 64; *Bloxam v. Metrop. Cab Co.*, 4 N. R. 51, and *ante*, p. 794, note (*h*).

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Sect. 4.
- Injunctions
granted.
9. The illegal issue of shares (*c*); *e.g.*, preference shares issued pursuant to a special resolution (*d*);
 10. The illegal forfeiture of shares (*e*);
 11. The unfair use by a company of a creditor's name in an action against a shareholder (*f*);
 12. The illegal suspension of a shareholder from his rights (*g*); *e.g.*, the improper rejection of his vote (*h*);
 13. The illegal payment of dividends not actually declared (*i*), *e.g.*, payment of dividends out of capital or borrowed money (*k*);
 14. The payment of dividends in shares (*l*) or debenture bonds (*m*);
 15. The payment of dividends out of profits shown by incomplete and partial accounts (*n*);
 16. The sanctioning of dividends on accounts not prepared and submitted in accordance with the articles of association (*o*);
 17. From acting on resolutions improperly passed (*p*); *e.g.*,
At a meeting at which the necessary quorum was not present (*q*);
By a majority made up of votes which ought not to have been counted (*r*);
On a resolution passed after the chairman had improperly refused to put an amendment (*s*);
At a meeting summoned by a conditional notice (*t*);
-
- (*c*) *Fraser v. Whalley*, 2 Hem. & M. 10.
- (*d*) *Hutton v. Scarboro' Cliff Co.*, 2 Dr. & Sm. 514 and 521. This case cannot now be relied upon, see *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361; *British and American, &c., Corp. v. Couper* [1894], A. C. pp. 416, 417, and *ante*, pp. 461 and 550. Compare under second head, Nos. 9 and 26.
- (*e*) *Johnson v. Lytle's Iron Agency*, 5 Ch. D. 687; *Watson v. Eales*, 23 Beav. 294; *Norman v. Mitchell*, 5 De G. M. & G. 648; *Naylor v. South Devon Rail. Co.*, 1 De G. & Sm. 32.
- (*f*) *Taylor v. Hughes*, 2 Jo. & Lat. 24, and other cases cited *ante*, p. 758.
- (*g*) *Adley v. Whitstable Co.*, 17 Ves. 315; 19 ib. 304; 1 Mer. 107. In the case of a friendly society, *Palliser v. Dale* [1897], 1 Q. B. 257.
- (*h*) *Pender v. Lushington*, 6 Ch. D. 70, and see *Moffatt v. Farguhar*, 7 Ch. D. 591.
- (*i*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *Carlisle v. South-Eastern Rail. Co.*, 1 Mac. & G. 680; *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606, and other cases cited *ante*, pp. 598 *et seq.*
- (*k*) *Dent v. London Tramways Co.*, 16 Ch. D. 344; *Davidson v. Gillies*, ib. 347, n.; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. Compare *Bloxam v. Metrop. Rail. Co.*, 3 Ch. 337; *McDougall v. Jersey Hotel Co.*, 2 Hem. & M. 528, and Nos. 12-17 under next head, with Nos. 13-15, *supra*.
- (*l*) *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.
- (*m*) *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 637.
- (*n*) *Foster v. New Trinidad, &c., Co.* [1901], 1 Ch. 208.
- (*o*) *Nicholson v. Rhodesia Trading Co.* [1897], 1 Ch. 434.
- (*p*) Compare cases under next head, No. 24.
- (*q*) *Hemans v. Hotchkiss Ordnance Co.* [1899], 1 Ch. 115.
- (*r*) *Randt Gold Mining Co. v. Wainwright* [1901], 1 Ch. 184.
- (*s*) *Henderson v. Bank of Australasia*, 45 Ch. D. 330.
- (*t*) *Alexander v. Simpson*, 43 Ch. D. 139. Compare *Tiessen v. Henderson* [1899], 1 Ch. 861, and *ante*, p. 424.

18. From carrying into effect an agreement passed at a meeting summoned by a notice which did not sufficiently disclose its character or the interest of the directors therein (*u*);

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Injunctions
granted.

19. From holding a meeting to confirm as a special resolution a resolution passed by an insufficient majority (*x*);

20. The making of loans to directors (*y*);

21. The departure by a company from the objects to attain which it was formed (*z*); viz., to restrain

A fire and life insurance company from engaging in marine insurances (*a*);

A railway company from dealing extensively in the purchase and sale of coals (*b*);

A railway company from guaranteeing the payment of dividends by a steam packet company (*c*);

From taking an unauthorised number of shares in another railway company (*d*);

From making a different railway from that which it was incorporated to make (*e*);

Or part only of such railway (*f*);

Or one only out of several railways which it had been formed to make (*g*);

A corporation having power to own and work tramways from running a line of omnibuses in connection with them (*gg*);

22. The transfer, by one company, of its business to another company (*h*), otherwise than under § 161 of the Companies Act, 1862 (*i*);

(*u*) *Kaye v. Croydon Tram. Co.* [1898], 1 Ch. 358; *Tiessen v. Henderson* [1899], 1 Ch. 861. See, too, *infra*, p. 802, note (*c*).

(*x*) *Young v. South African, &c., Syndicate* [1896], 2 Ch. 268. Compare under next head No. 25. In the absence of fraud, unless a poll is demanded, the declaration of the chairman that the resolution has been passed is conclusive under § 51 of the Act, 1862. *Hudleigh Castle Gold Mines, Ltd.* [1900], 2 Ch. 419; *Arnot v. United African Lands, Ltd.* [1901], 1 Ch. 518.

(*y*) *Bluck v. Mallalue*, 27 Beav. 398.

(*z*) As to the circumstances under which a petition to wind up the company might be proper, see *Crown Bank*, 44 Ch. D. pp. 645, 646.

(*a*) *Natusch v. Irving*, Part. 5th

ed. pp. 316 *et seq.*, and *Gow on Partnership*, App. 398, ed. 3.

(*b*) *A.-G. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*c*) *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*d*) *Salomons v. Laing*, 12 Beav. 377.

(*e*) *Bagshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51.

(*f*) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Logan v. Courtown*, 13 Beav. 22.

(*g*) *Hodgson v. Powis*, 12 Beav. 392 and 529, and 1 De G. M. & G. 6.

(*gg*) *A. - G. v. London County Council* [1901], 1 Ch. 781.

(*h*) *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096;

(*i*) For note (*i*) see next page.

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Injunctions
granted.

23. The amalgamation of two companies having similar objects (*k*);
24. A company and its directors from applying to Parliament at the expense of the company, for power to do what it was not formed to do (*l*);
25. A chartered company from surrendering its charter (*m*);
26. The publication of the contents of books and documents inspected under an order (*n*);
27. The payment out of the funds of a company of money borrowed by its promoters, to enable them to comply with the standing orders of the House of Lords (*o*);
28. Proceeding to arbitration under an *ultra vires* agreement (*p*);
29. Prosecuting a suit instituted by a stranger, but alleged to be for the benefit of the company (*q*);
30. Prosecuting proceedings for a libel on the directors (*r*);
31. The advertisement of a petition to wind up the company presented for an improper purpose (*s*);
32. The purchase by a company of its own shares (*t*);
33. Improper application of company's funds, viz. :—

Beman v. Rufford, 1 Sim. N. S. 550; *Winch v. Birkenhead, &c.*, Rail. Co., 5 De G. & S. 562. See, too, *Salomons v. Laing*, 12 Beav. 377; *Hattersley v. Shelburne*, 10 W. R. 801, where it was intended to obtain an Act to legalise the transfer. Compare *Wall v. London and Northern Assets Corp.* [1898], 2 Ch. 469; *Cotton v. Imperial and Foreign, &c., Corp.* [1892], 3 Ch. 454; and *Foster v. Borax Co.* [1901], 1 Ch. 326, where the company's memorandum of association authorised such a sale, and *infra*, p. 808, note (*c*).

(*i*) *Payne v. The Cork Company, Ltd.* [1900], 1 Ch. 308, where the agreement deprived the shareholder of his rights under the section. Compare under next head No. 51.

(*k*) *Kearns v. Leaf*, 1 Hem. & M. 681; *Gilbert v. Cooper*, 10 Jur. 580. See, also, the last note but one.

(*l*) *Lyde v. East Bengal Rail. Co.*, 36 Beav. 10; *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 290; *Vance v. East*

Lanc. Rail. Co., 3 K. & J. 50. See, also, *A.-G. v. Norwich*, 16 Sim. 225, and compare *Bateman v. Mayor of Ashton-under-Lyne*, 3 H. & N. 323, and Nos. 35—38 under the next head.

(*m*) *Ward v. Society of Attornies*, 1 Coll. 370, as to which, see *ante*, p. 445.

(*n*) See *Williams v. Prince of Wales Co.*, 23 Beav. 338.

(*o*) *Spackman v. Lattimore*, 3 Giff. 16.

(*p*) *Maunsell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130, and compare *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30. See also 31 Ch. D., p. 368.

(*q*) *Kernaghan v. Williams*, 6 Eq. 228.

(*r*) *Pickering v. Stephenson*, 14 Eq. 322, and compare *Studdert v. Grosvenor*, 33 Ch. D. 528, and *Breay v. Royal British Nurses Assoc.* [1897], 2 Ch. 272.

(*s*) *Re A Company* [1894], 2 Ch. 349.

(*t*) *Hope v. International Financial Soc.*, 4 Ch. D. 327. See also *Trevor v. Whitworth*, 12 App. Ca. 409.

Subscription to the Imperial Institute (u) ;

Subscription by an industrial society to a strike fund (x) ;

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Stamping proxy forms and paying return postage stamp on them (y). Injunctions

Printing proxy forms in a way calculated to influence the votes of granted.
shareholders (y) ;

Paying costs of a winding-up petition presented by the directors, but
opposed by a number of shareholders and a minority of directors (z) ;

Giving gratuities to servants and remunerating directors for past
services when company has ceased to carry on business (a) ;

34. Illegally preventing a person from acting as a director (b) ;

35. Directors from laying resolutions favourable to themselves on a
question in which their interests are in conflict with those of the share-
holders before a meeting which has been convened by them by a misleading
circular, and one which contains statements calculated to obtain proxies
in their favour without giving the shareholders sufficient information to
enable them to form a proper opinion as to the proper persons to whom to
entrust their votes (c) ;

36. Illegally preventing a debenture or stock holder from inspecting the
company's books (d) ;

37. Illegally preventing a creditor from taking copies of the company's
register of mortgages (e) ;

38. The distribution of the funds of a building society among the
members otherwise than in accordance with their rights under its
rules (g) ;

(u) *Tomkinson v. South Eastern Rail. Co.*, 35 Ch. D. 675.

(x) *Warburton v. Huddersfield Industrial Soc.* [1892], 1 Q. B. 817.

(y) *Studdert v. Grosvenor*, 33 Ch. D. 528.

(z) *Smith v. Duke of Manchester*, 24 Ch. D. 611.

(a) *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654, and compare *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754; *Taunton v. Royal Insurance Co.*, 2 H. & M. 135. *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

(b) *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610; *Munster v. Cammell Co.*, 21 Ch. D. 183. And see *Harben v. Phillips*, 23 Ch. D. 14; *Bainbridge v. Smith*, 41 Ch. D. 462; *Astley v. New Tivoli, Ltd.* [1899], 1 Ch. 151.

(c) *Jackson v. Munster Bunk*, 13

L. R. Ir. 118. Compare *Ise of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320, and *ante*, p. 801, note (u).

(d) *Holland v. Dickson*, 37 Ch. D. 669; *Mutter v. Eastern and Mid-lands Rail. Co.*, 38 Ch. D. 92.

(e) *Nelson v. Anglo-American Land, &c., Co.* [1897], 1 Ch. 130, and Comp. Act, 1862, § 43. Compare § 32 and *Balaghat Gold Mining Co.* [1901], 2 K. B. 665, overruling *Boord v. African Consolidated, &c., Co.* [1898], 1 Ch. 596. These sections do not apply in a winding up, *Kent Coalfields Syndicate* [1897], 1 Q. B. 754; *Somerset v. Land Securities Co.*, W. N. 1897, p. 29. And see *ante*, p. 434.

(g) *Botten v. City and Suburban, &c., Building Soc.* [1895], 2 Ch. 441. Compare *Pépé v. City and Suburban, &c., Building Soc.* [1893], 2 Ch. 311, and *Strohmenger v. Finsbury Building Soc.* [1897], 2 Ch. 469, where

Bk. III. Chap. 9. 39. The carrying into effect a deed for the dissolution of a building society not signed by the necessary statutory majority (*h*);
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40. The carrying into effect an agreement which involved an improper application of shares in payment of a commission to an underwriter (*i*).

Injunctions
refused.

II.—*An injunction has been refused to restrain—*

1. A company from commencing business on a smaller scale than contemplated by the prospectus, or before its nominal capital had been subscribed (*k*);

2. The making of calls by a company commencing business with less capital than that originally contemplated (*l*);

3. The making of necessary calls by directors who had been guilty of improper conduct (*m*);

4. The making of calls on some only of the members of an amalgamated society (*n*);

5. The making of calls on all the members of two amalgamated companies, to pay the debts of one of such companies (*o*);

6. Actions for calls on improperly relinquished or forfeited shares (*p*);

7. Forfeiting shares for non-payment of calls made by *de facto* directors (*q*);

8. The borrowing of money by a limited company (*r*);

9. The issuing of preference shares (*s*);

10. The application of the money raised by the issue of preference shares to a purpose different from that for which it was raised (*t*);

11. The return of deposits to subscribers (*u*);

the rules had been altered, and see *ante*, p. 717.

(*h*) *Siburn v. Pearce*, 44 Ch. D. 355.

(*i*) *Burrows v. Matabele Gold Reefs, &c., Co.* [1901], 2 Ch. 23; *Dexter v. United Gold Coast &c., Properties Ltd.*, W. N. 1901, p. 152, and see *ante*, p. 43, 44.

(*k*) *McDougall v. Jersey Hotel Co.*, 2 Hem. & M. 528. See now Companies Act, 1900, § 6, and *ante*, p. 209.

(*l*) *Norman v. Mitchell*, 19 Beav. 278, and 5 De G. M. & G. 648.

(*m*) *Logan v. Courtown*, 13 Beav. 22.

(*n*) *Bailey v. Birkenhead, &c., Rail. Co.*, 12 Beav. 433. Compare *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and see No. 21, *infra*.

(*o*) *Cooper v. Shropshire Union Rail. Co.*, 6 Ra. Ca. 136; S. C., 13

Jur. 443.

(*p*) *Hurris v. North Devon Rail. Co.*, 20 Beav. 384; *Playfair v. Birmingham, &c., Rail. Co.*, 1 Ra. Ca. 640.

(*q*) *Dawson v. African Consolidated, &c., Co.* [1898], 1 Ch. 6. Compare *Garden Gully, &c., Co. v. McLister*, 1 App. Ca. 39.

(*r*) *Bryon v. Metropolitan Saloon Omnibus Co.*, 4 Jur. N. S. 680, and on appeal, 3 De G. & J. 123. See No. 21.

(*s*) *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & Sm. 537; *Andrews v. Gas Meter Co.* [1897], 1 Ch. 361. See under first head, No. 9.

(*t*) *Yetts v. Norfolk Rail. Co.*, 3 De G. & Sm. 293. See No. 15, *infra*.

(*u*) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

12. The payments of dividends actually declared (*x*);
13. The payment of dividends before payment of debts (*y*);
14. The payment of dividends before the completion of the company's works (*z*);
15. The payment of dividends without making good lost capital (*a*);
16. The payment of dividends out of profits arising from the sale of part of the company's undertaking (*b*);
17. The payment of interest out of capital on capital paid up in advance of calls (*c*);
18. The setting aside of a reserve fund before the payment of dividends on the preference shares (*d*);
19. The prevention of a duly appointed director from acting, the shareholders having resolved that they did not desire him to act (*e*);
20. The continuance in office of directors appointed in the place of others removed for alleged misconduct (*f*);
21. The management of a company's affairs by directors whose conduct was complained of; no sufficient attempt having been made to control them before applying to the Court (*g*);
22. Directors improperly appointed, from acting (*h*);
23. Directors from putting their own names on negotiable instruments relating to the affairs of the company (*i*);
24. From giving effect to resolutions alleged to be invalid (*k*) on the following grounds, viz., because—
- On the show of hands the votes represented by proxies were not counted (*l*);

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Injunctions
refused.

(*x*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; the suit, however, was defective for want of parties. See *ante*, p. 774, note (*q*). And compare Nos. 12—17 with Nos. 13 to 16 under the first head.

(*y*) *Stevens v. South Devon Rail. Co.*, 9 Ha. 326. See No. 21.

(*z*) *Browne v. Monmouthshire, &c., Rail. Co.*, 13 Beav. 32. See No. 21.

(*a*) *Lee v. Neufchatel, &c., Co.*, 41 Ch. D. 1; *Wilmer v. McNamara & Co.* [1895], 2 Ch. 245; *Verner v. General and Commercial Trust* [1894], 2 Ch. 239; *Bolton v. Natal Land, &c., Co.* [1892], 2 Ch. 124. And see *ante*, p. 600.

(*b*) *Lubbock v. British Bank of South America* [1892], 2 Ch. 198. Compare *Foster v. New Trinidad, &c., Co.* [1901], 1 Ch. 208.

(*c*) *Lock v. Queensland Investment, &c., Co.* [1896], A. C. 461.

(*d*) *Fisher v. Black and White*

Publishing Co. [1901], 1 Ch. 174.

(*e*) *Bainbridge v. Smith*, 41 Ch. D. 462.

(*f*) *Inderwick v. Snell*, 2 Mac. & G. 216.

(*g*) *McDougall v. Gardiner*, 1 Ch. D. 13, and 10 Ch. 606; *Carlen v. Drury*, 1 V. & B. 154; *Waters v. Taylor*, 15 Ves. 10; *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790. And see *Harben v. Phillips*, 23 Ch. D. 14. This principle was acted on in the cases cited under Nos. 4, 5, 8, 9, 10, 13, 14.

(*h*) *Hattersley v. Shelburne*, 10 W. R. 881. And see *Imperial Hydro-pathic Hotel Co. v. Hampson*, 23 Ch. D. 1.

(*i*) *Bluck v. Mallalue*, 27 Beav. 398.

(*k*) Compare under first head, No. 17.

(*l*) *Ernest v. Loma Gold Mines,*

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refused.

- Votes had been improperly rejected and others improperly received; the articles precluding any objection being taken on this ground (*m*); A special resolution declared to have been passed by the chairman was alleged not to have been passed (*n*);
- The meeting was convened by an irregular meeting of directors (*o*); The resolutions being those of a meeting of directors, the notice calling the meeting did not specify the business to be transacted (*p*);
25. From holding a meeting to pass resolutions which, if passed, would be futile (*q*);
26. From altering articles of association (*r*), or holding meetings (*s*) to authorise the creation of preference shares;
27. From enforcing a lien on shares given by an alteration of the articles of association (*t*);
28. A company limited by guarantee and not having a capital divided into shares from carrying into effect new articles whereby the interests of the members were divided into transmissible shares (*u*);
29. From acting on new rules of a building society by which the rights of the members had been varied (*x*);
30. From creating a charge on uncalled capital (*y*);
31. From completing a purchase of and issuing prospectuses relating to a concession for lotteries in Persia, which was alleged to be unlawful under the Lotteries Acts (*z*);

Ld. [1897], 1 Ch. 1. See, too, *Horbury Bridge Coal, &c., Co.*, 11 Ch. D. 109. *Bidwell Brothers* [1893], 1 Ch. 603, is overruled.

(*m*) *Wall v. London and Northern Assets Corporation* [1899], 1 Ch. 550.

(*n*) *Arnot v. United African Lands, Ltd.* [1901], 1 Ch. 518; *Hadleigh Castle Gold Mines* [1900], 2 Ch. 419. Under Comp. Act, 1862, § 51, the chairman's ruling is conclusive in the absence of fraud, unless a poll is demanded. *Young v. South African, &c., Syndicate* [1896], 2 Ch. 268, is overruled on this point.

(*o*) *Browne v. La Trinidad*, 37 Ch. D. 1. Compare *Haycraft Gold Reduction, &c., Co.* [1900], 2 Ch. 230, and *State of Wyoming Syndicate* [1901], 2 Ch. 431.

(*p*) *La Compagnie de Mayville v. Whitley* [1896], 1 Ch. 788.

(*q*) *Harper v. Payet*, not reported, but referred to 44 Ch. D. pp. 328,

329. Compare under first head No. 19.

(*r*) *Andrewes v. Gas Meter Co.* [1897], 1 Ch. 361. See *ante*, p. 800, note (*d*); and as to alteration of articles, *ante*, pp. 461 *et seq.*

(*s*) *Underwood v. London Music Hall, Ltd.* [1901], 2 Ch. 309.

(*t*) *Allen v. Gold Reefs of West Africa* [1900], 1 Ch. 657.

(*u*) *Malleson v. General Mineral, &c., Syndicate* [1894], 3 Ch. 538. This is now prohibited. See Companies Act, 1900, § 27.

(*x*) *Strohmenger v. Finsbury Building Socy.* [1897], 2 Ch. 469; *Pépé v. City and Suburban, &c., Building Society* [1893], 2 Ch. 311. Compare under the first head Nos. 38 and 39.

(*y*) *Jackson v. Rainford Coal Co.* [1896], 2 Ch. 340. See *ante*, pp. 316 *et seq.*

(*z*) *Macnee v. Persian Investment Corporation*, 44 Ch. D. 306.

32. The sailing of a ship on a voyage disapproved of (a) ;
33. The assignment of a company's property to trustees, upon trust to sell and pay the company's debts (b) ;
34. The total abandonment by a railway company of its works, it not having funds to complete them (c) ;
35. The application to Parliament, otherwise than at the expense of the company, for power to enable the company to do what it was never intended it should do (d), though the application is in the name and under the seal of the company (e) ;
36. The sealing of an agreement to make such an application (f) ;
37. A company from applying to a foreign legislature for increased powers (g) ;
38. An application to Parliament to legalise an agreement for the transfer of the business of one company to another (h) ;
39. A railway company empowered to purchase a canal, from exercising the powers of a canal company (i) ;
40. A railway company having steam ferry-boats, from using them for other than ferry purposes when not wanted for those purposes (k) ;
41. A railway company from carrying out a traffic agreement entered into with another company (l) ;
42. A railway company from letting out arches under its embankment (m) ;
43. A racecourse company from allowing betting in an inclosure on its course (n) ;
44. A company, the publishers and proprietors of a newspaper, from expending its funds in defending an action of libel against the editor of its newspaper (o) ;
45. An hotel company from temporarily letting part of its hotel for other than hotel purposes (p) ;

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refused.

- (a) *Miles v. Thomas*, 9 Sim. 606.
- (b) *Lord v. Governor and Co. of Copper Miners*, 2 Ph. 740.
- (c) *Logan v. Courtown*, 13 Beav. 22.
- (d) *Ware v. Grand Junc. Waterworks Co.*, 2 R. & M. 470.
- (e) *Ex parte Hartridge*, 5 Ch. 671; *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 290. Compare *Maunsell v. Midland Great West. Rail. Co.*, 1 Hem. & M. 130, and No. 24 under the first head.
- (f) *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 580.
- (g) *Bill v. Sierra Nevada Mining Co.*, 1 De G. F. & J. 177.
- (h) *Huttersley v. Earl of Shelburne*, 10 W. R. 881.
- (i) *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662.
- (k) *Forrest v. Manchester, &c., Rail. Co.*, 30 Beav. 40, affirmed on appeal, 4 De G. F. & J. 126, but on a different ground.
- (l) *Hare v. London and North-Western Rail. Co.*, 2 J. & H. 80.
- (m) *Foster v. London, Chatham and Dover Rail. Co.* [1895], 1 Q. B. 711.
- (n) *Powell v. Kempton Park, &c., Co.* [1899], A. C. 143.
- (o) *Breay v. Royal British Nurses Assoc.* [1897], 2 Ch. 272. Compare No. 30 under first head.
- (p) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141, and 8 H. L. C. 712.

- Bk. III. Chap. 9. Sect. 4. 46. A fire insurance company from paying for losses usually paid for but not covered by its policies (*q*);
- Injunctions refused. 47. The discharge of a servant whose engagement was provided for in the company's articles of association (*r*);
48. The non-registry of a transfer of shares (*s*);
49. At the instance of a shareholder, the carrying into effect an agreement for the sale of the company's business under a power in the company's memorandum of association (*t*);
50. The voluntary winding up of a company with a view to a transfer of its business under § 161 of the Companies Act, 1862 (*u*);
51. At the instance of a shareholder, the carrying into effect an agreement under § 161 of the Act, 1862, for the sale of the company's business, with a view to a reconstruction (*x*);
52. The surrender of part of its property with a view to improving the remainder (*y*);
53. The reduction of capital (*z*);
54. A general meeting called by shareholders under § 70 of the Companies Clauses Act, 1845 (*a*);
55. At the instance of a simple contract creditor to restrain the company from dealing with its assets as it pleases (*b*);
56. At the instance of the holders of debentures containing a floating charge on the company's assets, to restrain the company from selling its business (*c*);
57. At the instance of a minority of debenture holders, to restrain the company from carrying out a compromise sanctioned by a majority of the debenture holders under a provision in the debentures giving the majority power to bind the minority (*d*);

(*q*) *Taunton v. Royal Insur. Co.*, 2 Hem. & M. 135.

(*r*) *Mair v. Himalaya Tea Co.*, 1 Eq. 411.

(*s*) *Taft v. Harrison*, 10 Ha. 489.

(*t*) *Cotton v. Imperial, &c., Corporation* [1892], 3 Ch. 454; *Wall v. London and Northern Assets Corporation* [1898], 2 Ch. 469. Compare No. 22 under the first head.

(*u*) *Southall v. British Mutual Life Ass. Soc.*, 11 Eq. 65, and 6 Ch. 614.

(*x*) *Postlethwaite v. Port Phillip, &c., Mining Co.*, 43 Ch. D. 452; *Burdett Coutts v. True Blue Gold Mine* [1899], 2 Ch. 616. Compare *Payne v. The Cork Co., Ltd.* [1900], 1 Ch. 308.

(*y*) *Thomson v. Trustees, Executors,*

&c., Corporation [1895], 2 Ch. 454.

(*z*) *Bunnatynne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287. Compare *Taylor v. Pilsen Light Co.*, 27 Ch. D. 268, and *ante*, pp. 556 *et seq.*

(*a*) *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320.

(*b*) *Mills v. Northern Railway of Buenos Ayres Co.*, 5 Ch. 621.

(*c*) *Foster v. Borax Co.* [1901], 1 Ch. 327; *Metropolitan Bank of England, &c. v. H. H. Vivian & Co.* [1900], 2 Ch. 654. See *ante*, pp. 318 *et seq.*

(*d*) *Sneath v. Valley Gold, Ltd.* [1893], 1 Ch. 477; *Mercantile Investment Co. v. River Plate, &c., Co.* [1894], 1 Ch. 578, and compare *Mercantile Investment Co. v. International Co. of Mexico* [1893], 1 Ch.

58. From paying a pension to the family of a deceased officer of the Bk. III. Chap. 9.
company (e). Sect. 4.

59. Preventing a shareholder who had made an application for the removal of a liquidator from issuing a circular to other shareholders asking for their support (ee).

5. *Receivers.*

The object of obtaining a receiver is to protect property and Receivers.
to insure its due application in accordance with the rights of the persons interested in it. A receiver is not the same as a manager appointed to carry on a business; but when necessary the same person will be appointed receiver and manager. The Judicature Act, 1873, § 25 (8), authorises the appointment of a receiver whenever the Court is of opinion that it is just or convenient to appoint one (f). This general enactment enlarges the powers of the Court, but regard is still had to the principles on which the Court of Chancery acted before the Judicature Acts came into operation (g).

Receivers of a company's property are seldom appointed When appointed.
unless there are conflicting claims to be adjusted, e.g., disputes between secured and unsecured creditors, between debenture holders and judgment creditors, between various classes of shareholders, &c.

The circumstances under which receivers and managers will be appointed at the instance of debenture holders, the effect of their appointment, and their position when appointed have been already discussed (h).

A receiver appointed at the instance of debenture holders to Liability for
rent, &c.
whom the company's leaseholds have been mortgaged by sub-demise, is not liable to the head lessor either for rent during the time he is in possession of the premises or for damages for a breach of the company's covenant in the head lease to repair; but if the mortgage is by assignment the Court will see that

484, note, where there being no dispute there was no room for the provision as to a compromise.

(e) *Henderson v. Bank of Australasia*, 40 Ch. D. 170. Compare cases cited *ante*, p. 803, note (a).

(ee) *New Gold Coast Exploration Co.* [1901], 1 Ch. 860, and the comments therein on *J. and P. Coats v.*

Chadwick [1894], 1 Ch. 347, and *Re Crown Bank*, 44 Ch. D. 649.

(f) Just or convenient is construed just and convenient. See *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30; *Holmes v. Millage* [1893], 1 Q. B. 558.

(g) *Ibid*; and *ante*, 798.

(h) See *ante*, pp. 331 *et seq.*

Bk. III. Chap. 9. the rent and all proper outgoings are paid out of the assets
Sect. 4. — got in by him (i).

The appointment of a receiver at the instance of a judgment creditor does not make him a secured creditor (j).

Liquidator
as receiver.

When a company is being wound up the liquidator is a receiver of its assets for the benefit of its shareholders and creditors; but this does not prevent persons having claims upon the assets in priority to the liquidator from obtaining a receiver of them so as to protect their preferential rights. The liquidator, however, is usually appointed the receiver in such cases (k).

Receiver an
officer of the
Court.

A receiver is an officer of the Court, and any interference with him or with the property under his protection is punishable as a contempt of Court. A person who desires to obtain such property must apply to the Court for an order for its delivery to him or for permission to take it (l).

Manager.

A manager of a business is never appointed by the Court unless temporarily, and with a view to a sale or winding up of the business (m).

Remuneration,
how fixed.

If the remuneration of a receiver or manager is not fixed by the Court on or soon after his appointment, it is sometimes fixed by the taxing-master when taxing his costs and remuneration, but is more usually referred by the taxing-master to the master in ordinary (mm).

6. Of Mandamus.

Actions for
mandamus.

The Common Law Procedure Act, 1854 (n), authorises the issuing of a mandamus in an action to enforce the fulfilment

(i) *Hand v. Blow* [1901], 2 Ch. 721, and *Oak Pitts Colliery Co.*, 21 Ch. D. 322.

(j) *Croshaw v. Lyndhurst Ship Co.* [1897], 2 Ch. 154. For receivers appointed at the instance of judgment creditors of a railway company, see *ante*, p. 393.

(k) See *ante*, p. 341.

(l) *Russell v. East Anglian Rail. Co.*, 3 Mc. & G. 104. See further as to his position, *ante*, p. 382.

(m) *Partn. 531 et seq.*; *Roberts v.*

Eberhardt, Kay, 148, and *ante*, p. 336, as to the appointment of a special manager when a company is being wound up by the Court. See *Companies Winding-up Act*, 1890, § 5, and *infra*, Bk. IV.

(mm) *Silkstone and Haigh Moor Coal Co. v. Edey* [1901], 2 Ch. 652. As to the taxing-master's power to make a separate certificate as to costs, see *ib.*

(n) 17 & 18 Vict. c. 125, § 68, repealed by 46 & 47 Vict. c. 49.

of any duty in the fulfilment of which the person applying for the writ is personally interested; and the Judicature Act, 1873, § 25 (8), has still further enlarged the power of the Court to grant a mandamus (*o*). An action for mandamus can be brought in the Chancery Division of the High Court, and that Division has jurisdiction to grant a mandamus in any action or matter pending before it (*p*). It has been held that the writ ought not to issue for the purpose of compelling the specific performance of an ordinary agreement (*q*), but it has been allowed to go to compel a chartered company to register as a shareholder, a person entitled to be so registered by the provisions of the company's deed of settlement (*r*): and in a recent action for mandamus a clerk has been ordered to deliver up papers (*s*).

It has been said that where an action for mandamus will lie, the prerogative writ will not be allowed to issue (*t*). Though this is not a fixed and positive rule of law (*u*), it will seldom be necessary or proper to apply for a prerogative writ to settle disputes between companies and their members.

A prerogative writ has, however, been allowed to compel—

The production of a company's register to a creditor (*x*);

The entry on the register of the probate of the will of a deceased shareholder (*y*);

The registry or transfer of shares (*z*);

The production to a shareholder, for a proper purpose and at a proper time, of such books as he has a right to inspect (*a*);

(*o*) See R. S. C. Ord. LIII.

(*p*) *Paris Skating Rink Co.*, 6 Ch. D. 731, where a mandamus was asked for to compel the holding of a general meeting in pursuance of the articles of association.

(*q*) *Benson v. Paull*, 6 E. & B. 273.

(*r*) *Norris v. Irish Land Co.*, 8 E. & B. 512.

(*s*) *Newington Local Board v. Eldridge*, 12 Ch. D. 349.

(*t*) *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463, and *infra*, p. 812, note (*y*).

(*u*) *R. v. London and North-West.*

Rail. Co. [1894], 2 Q. B. p. 518.

(*x*) *R. v. Derbyshire, &c., Rail. Co.*, 3 E. & B. 784.

(*y*) *R. v. Worcester Canal Co.*, 1 M. & R. 529.

(*z*) See *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 17 ib. 645; *R. v. General Cemetery Co.*, 6 E. & B. 415, and see *ante*, p. 79, and *infra*, note (*l*).

(*a*) *R. v. Saddlers' Co.*, 10 W. R. 87. See, also, *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477, and *R. v. Mariquita, &c., Mining Co.*, 1 E. & E. 289. In the two last cases,

Bk. III. Chap. 9. The admission of persons to offices to which they have been
Sect. 4. — elected (b) ;

The election of directors and officers required to be appointed (c) ;

The appointment of a public officer by a company empowered to sue and be sued by one (d) ;

The payment by such a company of a debt for which judgment has been obtained against its officer (e) ;

The making of a call for the payment of a creditor having no other remedy (f) ;

Refused. On the other hand, a mandamus has been refused to compel the Registrar of Joint Stock Companies to register as an existing company under Part VII. of the Companies Act, 1862, an association of seven persons formed to wind up a partnership business (g) ; to compel the Registrar of Friendly Societies to register a trade union in the case of a dispute between two rival sections (h) ; to compel the Bank of England to register a transfer of consols in the joint names of a corporation and an individual (i) ; to compel a company to pay a shareholder dividends wrongfully withheld from him (k) ; to compel a company to register a transfer of its stock (l) ; to compel it

however, the writ was refused. See as to inspection and taking copies, *Mutter v. Eastern and Midlands Rail. Co.*, 38 Ch. D. 92, *Holland v. Dickson*, 37 ib. 669, and cases *ante*, p. 803, note (c), which show that an injunction will be granted, and that a mandamus is not necessary.

(b) *Anon.*, 2 Str. 696 ; *Da Costa v. Russia Co.*, ib. 783 ; Com. Dig. Mand. B. 2.

(c) See *per* Tindal, C.J., in *Thames Haven Dock Co. v. Rose*, 4 Man & Gr. 559.

(d) See *per* Parke, B., in *Steward v. Greaves*, 10 M. & W. 721.

(e) *Corpe v. Glyn*, 3 B. & Ad. 801 ; *R. v. St. Katherine Dock Co.*, 4 B. & Ad. 360.

(f) See *R. v. Victoria Park Co.*, 1 Q. B. 288, where the mandamus

was refused, the creditor being in a position to issue execution against the company, though not to get satisfaction by so doing.

(g) *R. v. Registrar of Joint Stock Companies* [1891], 2 Q. B. 598.

(h) *R. v. Registrar of Friendly Societies*, L. R. 7 Q. B. 741.

(i) *Law Guarantee, &c., Society v. Governor of Bank of England*, 24 Q. B. D. 406. But see now *ante*, p. 734.

(k) *R. v. Whitstable Co.*, 7 East, 353.

(l) *R. v. Bank of England*, 2 Doug. 524 ; *R. v. London Ass. Co.*, 5 B. & A. 899. *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463 ; *R. v. Shropshire, &c., Canal Co.*, L. R. 8 Q. B. 420, *ante*, note (z).

to produce its books to the shareholders for the purpose of enabling them to consider whether a dividend shall or shall not be declared and paid (*m*); to compel it to make calls for the payment of a debt (*n*); to compel the Bank of England to permit a person who had no *bonâ fide* interest in unclaimed stock to inspect the register thereof (*o*).

The King's Bench Division alone has power to grant the prerogative writ (*p*); and the Court has a wide discretion in granting or refusing it (*q*). No prerogative writ of mandamus is allowed to go except to enforce some public duty (*r*); nor unless the applicant has (*s*) and has been denied the right he seeks to enforce (*t*); nor unless he applies for the writ within a reasonable time after such denial (*u*); nor unless the Court is satisfied that its interference is sought for a proper purpose (*x*); nor unless the applicant having a legal right has no other adequate legal remedy (*y*). The fact that the neglect of the duty sought to be enforced exposes the person against whom the mandamus is asked to a penalty, does not necessarily prevent the mandamus from being granted (*z*).

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Discretion of
the Court.

(*m*) *R. v. Bank of England*, 2 B. & A. 620.

(*n*) *R. v. Victoria Park Co.*, 1 Q. B. 288.

(*o*) *R. v. Governor of Bank of England* [1891], 1 Q. B. 785.

(*p*) See *Glossop v. Keston Local Board*, 12 Ch. D. p. 115, and *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. p. 469. As to the mode of application for such a writ, see Crown Office Rules, 1886, rr. 60 *et seq.*

(*q*) *R. v. Leicester Union* [1899], 2 Q. B. 632; *R. v. Commissioners of Inland Revenue*, 12 Q. B. D. 461, p. 478; *R. v. Lond. & N.-W. Ry.* [1894], 2 Q. B. 518; *R. v. Governor of Bank of England* [1891], 1 Q. B. 785.

(*r*) See the cases in notes (*k*) to (*n*), and Shortt on Mandamus.

(*s*) He must have a clear legal right, *R. v. Lewisham Union* [1897], 1 Q. B. 498.

(*t*) *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477.

(*u*) *R. v. Cockerham Inclosure Commissioners*, 1 B. & Ad. 378.

(*x*) *R. v. Governor of Bank of England* [1891], 1 Q. B. 785; *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477; *R. v. Liverpool, Manchester, &c., Rail. Co.*, 21 L. J. Q. B. 284.

(*y*) See *R. v. Chester*, 1 T. R. 396; *R. v. Stafford*, 3 ib. 646; *R. v. Victoria Park Co.*, 1 Q. B. 288; *R. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131; *R. v. Charity Commissioners* [1897], 1 Q. B. 407; *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463. Compare *R. v. L. & N.-W. Rail. Co.* [1894], 2 Q. B. p. 518, and *R. v. Leicester Union* [1899], 2 Q. B. 632.

(*z*) *R. v. Clear*, 4 B. & C. 899; *R. v. Everet*, Cases temp. Hardwicke, 261.

Bk. III. Chap. 9. A second application for the prerogative writ will not be granted after a first application has been refused (*a*).
Sect. 4. — —

Mandamus to undo.

It has been held that, although a corporation may be compelled by mandamus to affix its seal to a document (*b*), it cannot be thus compelled to remove its seal from a document (*c*). But it is submitted that the difference between doing and undoing, is, in such a case as that alluded to, a difference in words rather than in substance. Registers of shareholders may be rectified both by inserting names wrongfully omitted and by striking out names wrongfully inserted, as has been seen already (*d*).

7. Other Miscellaneous Actions.

Remuneration of promoters.

Promoters of companies cannot maintain actions against each other for remuneration for their services unless there is some express contract for their payment (*e*). But a person who is retained by the promoters to assist them, is entitled to be paid by them for his services, although he may afterwards himself subscribe for shares in the company (*f*).

Company required to pay expenses of formation.

Where a company is required by Act of Parliament to apply its first funds in defraying the expenses of its formation, an action lies against it by those who have expended their money, time, and trouble, in forming the company, and who have no other paymasters. But a clause in a company's deed of settlement or articles of association to the like effect, does not necessarily have the same operation (*g*).

Contribution between promoters.

Although the promoters of companies are not impliedly liable to each other for services rendered, nor for money expended by any of them in the prosecution of their common design; still, if they render themselves jointly liable to a

(*a*) *R. v. Mayor of Bodmin* [1892], 419.
2 Q. B. 21; *Ex parte Thompson*, 6 Q. B. 721.

(*b*) *R. v. Windham*, Cowp. 377; *R. v. Cambridge*, 3 Burr. 1647; *R. v. York*, 4 T. R. 699.

(*c*) *Ex parte Nash*, 15 Q. B. 92.

(*d*) *Ante*, p. 79.

(*e*) See *Holmes v. Higgins*, 1 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532; *Milburn v. Codd*, 7 B. & C.

(*f*) *Lucas v. Beach*, 1 Man. & Gr. 417. See, too, *Caldicott v. Griffiths*, 8 Ex. 898; and *Barnett v. Lambert*, 15 M. & W. 489. Compare *Gorgier v. Morris*, 7 C. B. N. S. 588, where the company was never formed, and the agreement was to pay the plaintiff in shares.

(*g*) See *ante*, pp. 196 *et seq.*

third party, and, by virtue of that liability, some only of them are compelled to pay what ought, as between themselves and the others, to be paid by all, an action of contribution lies, at the suit of those who have been so compelled to pay, against the others; and even before the Judicature Acts it was no objection to such an action that there were unsettled accounts which required to be taken, before what was due from each to the other could be properly ascertained (*h*).

If a person has agreed to take shares in a proposed company, and to pay a deposit in respect of such shares, an action will lie for the recovery of the deposit he has agreed to pay (*i*). The persons to bring such action are those with whom the agreement sued upon was made. If, therefore, the agreement was with the members of the provisional committee, those members, and not the managing section of them, are the proper parties to sue (*k*).

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Actions for
deposits agreed
to be paid.

Actions by subscribers for the return of their deposits have been already considered (*l*).

With respect to ordinary actions between companies and their shareholders, it is unnecessary to add to what has been said in previous chapters. The following subjects have, in fact, been already considered, viz.:—

Actions between
companies and
their members.

1. Actions between the promoters of companies and by and against persons who have subscribed for shares (*m*).

2. Applications by shareholders to have a company's register rectified (*n*).

3. Actions by shareholders whose shares have been illegally forfeited (*o*).

(*h*) *Boulter v. Peplow*, 9 C. B. 493; *Batard v. Hawes*, 2 E. & B. 287; *Edger v. Knapp*, 7 Jur. 583, C. P. It may be observed here, that where the promoters of a company retain a solicitor, they are all liable to be sued by him for payment of his bill, and that a delivery by him of his bill, duly signed, to any one of those liable, is a sufficient delivery to all, *Mant v. Smith*, 4 H. & N. 324; and that any one of them is entitled to tax his bill,

Re Stephen, 2 Ph. 562.

(*i*) See, for instance, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356.

(*k*) *Woolmer v. Toby*, 10 Q. B. 691.

(*l*) *Ante*, pp. 33 *et seq.*, and § 1 (3) of the present chapter.

(*m*) *Ante*, p. 33.

(*n*) *Ante*, pp. 79 *et seq.*, and 165 *et seq.*

(*o*) *Ante*, pp. 729, 730, and 780.

Bk. III. Chap. 9.
Sect. 4.

4. Actions between the buyers and sellers of shares, and between them and the brokers employed by them (*p*).

5. Actions for contribution and indemnity (*q*).

6. Actions for calls (*r*).

7. Actions for dividends (*s*).

Actions between companies and the holders of debentures and debenture stock have also been considered (*t*).

(*p*) *Ante*, pp. 673 *et seq.*

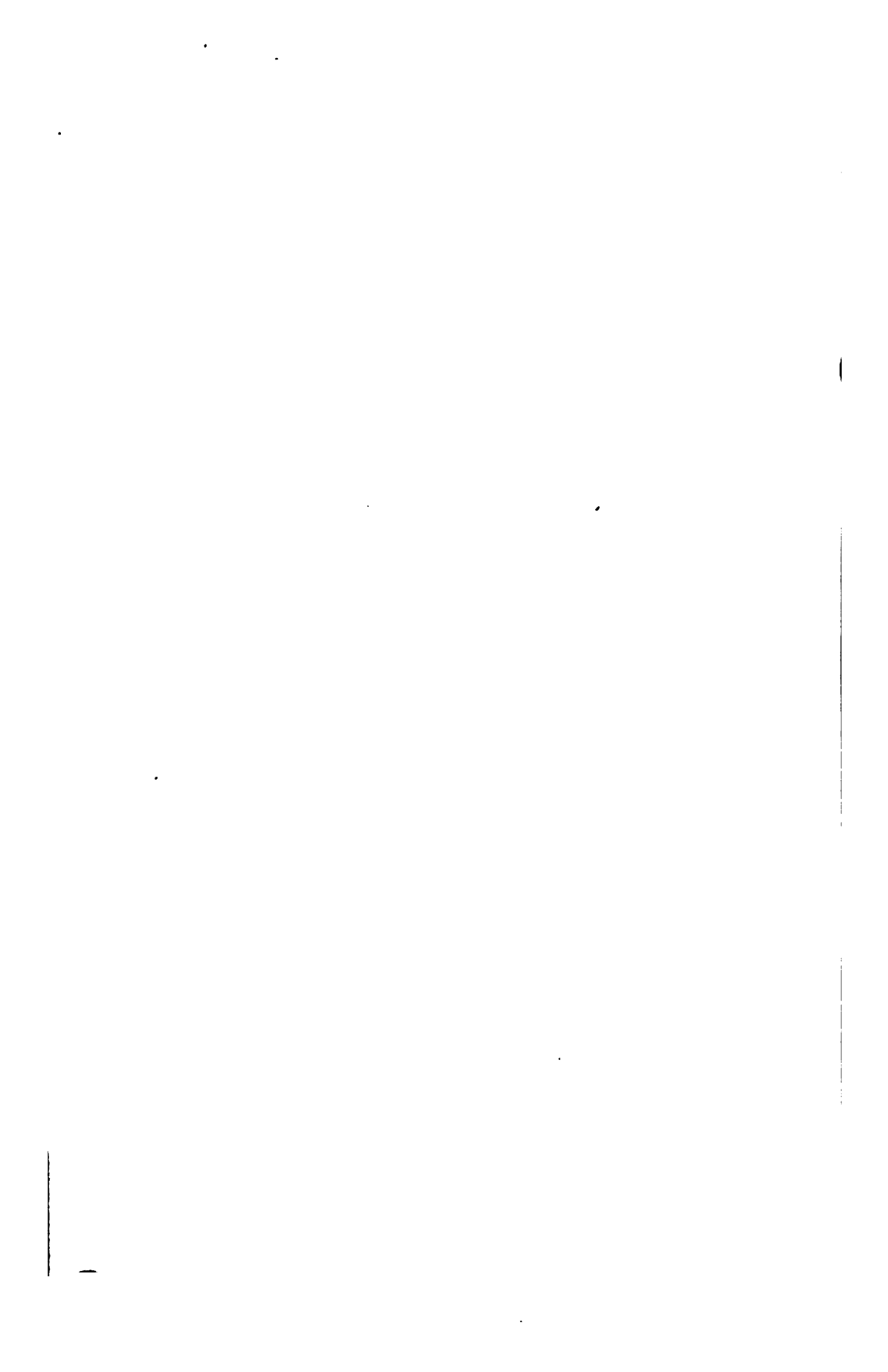
(*q*) *Ante*, pp. 532 *et seq.*

(*r*) *Ante*, p. 395.

(*s*) *Ante*, p. 609.

(*t*) *Ante*, pp. 334 *et seq.*









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